H.R. 3841, OMNIBUS CIVIL SERVICE REFORM BILL

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CIVIL SERVICE

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

H.R. 3841

TO AMEND THE CIVIL SERVICE LAWS OF THE UNITED STATES, AND FOR OTHER PURPOSES

JULY 16, 1996

Printed for the use of the Committee on Government Reform and Oversight

U.S. GOVERNMENT PRINTING OFFICE

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-055848-4

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H.R. 3841, OMNIBUS CIVIL SERVICE REFORM BILL

TUESDAY, JULY 16, 1996

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CIVIL SERVICE,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:05 p.m., in room 2154, Rayburn House Office Building, Hon. John L. Mica (chairman of the subcommittee) presiding.

Present: Representatives Mica, Morella, and Moran.

Staff present: George Nesterczuk, staff director; Ned Lynch, professional staff member; Caroline Fiel, clerk; and Cedric Hendricks and Mike Kirby, minority professional staff members.

Mr. MICA. I would like to call this meeting of the House Civil Service Subcommittee to order.

We have quite a number of witnesses and three panels, a long hearing today. I want to proceed, and we will be joined by some of the others in just a few minutes.

I would like to say good afternoon and welcome to our witnesses, those that are with us today, and welcome to the hearing. Our subcommittee has conducted intensive hearings to identify and analyze the challenges facing Federal employment. Today, we are approaching a consensus about what changes we can adapt to our current civil service law to reflect the requirements of our current work environment.

We have held extensive meetings of both Democrats and Republican Members and staff and consulted widely with employee organizations to develop some of the proposals that we have incorporated into our draft legislation. We are hoping in the next few days to craft and finalize some legislation that would enhance the effectiveness and effective performance in our Federal workplace. We would also like to provide more flexible employment conditions.

Just as the private sector has adjusted to accommodate people changing career patterns, the Federal workplace must adapt to accommodate new technologies, changing agency missions, and eliminate old functions and assume the new roles that are so necessary in our dynamic and fluid Federal workplace.

In this changing world, the Federal agencies cannot be allowed to stagnate if they are to provide effective service to the American people. Throughout the past year, I have been struck by the challenges that Federal agencies face relating to managing poor performers. It has been one of my priority items for reform.

We have heard from many witnesses that the current Federal service system provides very limited incentives to our best employees while erecting enormous hurdles when it comes to improving or removing problem employees. We need to agree on effective measures to enable outstanding employees to do a better job and give them the tools to do a better job. We must also find suitable ways to curb the damaging effects of problem employees in the Federal agencies.

I believe we have a consensus that the management of employee performance is of vital importance; however, it seems that the means to ensure that it happens still elude us. We have collected a few suggestions and are even open at this stage to additional ideas. We have heard that our civil service system is too rigid and needs to be more flexible.

Many agencies have testified that a one-design-fits-all or one-size-fits-all civil service can no longer accommodate the breadth of responsibilities and multitude of talents required by our Federal agencies.

The administration is seeking unlimited authority to conduct demonstration projects without congressional review. That is perhaps too much flexibility, but certainly allowing broader demonstration authority can lead to recommendations for more comprehensive reform in the future.

The time is also right to revisit some of the provisions of the Federal Employees' Retirement System. The Thrift Savings Plan has played an increasingly important role in securing the retirement income of Federal employees. Participation rates have increased steadily, and there is a desire to expand investment options by creating an international index fund and a small capitalization index fund.

Employees are also interested in contributing more of their incomes and in having easier access to their funds when they need them. These are reasonable expectations and worthy of our consideration. We are very much constrained, however, by budgetary factors, and the budget will ultimately limit the scope of our actions in this area.

On another front, Federal agencies need help to reduce their work forces and to plan for their future personnel needs. Although the administration is not recommending major cuts in many nondefense agencies, reduced appropriations will, in fact, drive staff reductions in the future. Accordingly, the subcommittee has directed extensive efforts this year in considering soft landing measures to assist Federal employees in work force transitions. Such measures were the focus of two hearings that we held earlier this year.

A number of good ideas have come out of this process, such as enabling employees to volunteer for separation in a RIF. Another would authorize employees facing reductions to transfer to other agencies on nonreimbursable details to demonstrate both their skills and abilities.

Where Federal agencies convert functions to contract, affected employees would benefit from a right of first refusal to positions with a contractor. As a means of easing the transition to the private sector, we are considering outplacement counseling, education, and retraining benefits as well as relocation allowances.

Affordability of life insurance and health benefits are also important considerations in bridging career changes. We have drawn freely from many bills and many legislative proposals offered by our colleagues, Congresswoman Morella, Congressman Moran, Congressman Davis, and Congressman Wolf, who is not a member of the subcommittee, and a number of other individuals have contributed to this process. We have several dozen legislative proposals. I also appreciate the participation of both the majority and minority staff, who have worked in developing recommendations and will contribute substantially to the resolution of several important issues as we try to move this legislation forward.

The administration provided an extensive set of proposals, which we have tried to accommodate, and we have included a number of proposals also from the employee organization. The process has been very open, and we appreciate the contributions of today's witnesses. I want to welcome their participation and look forward to their support as we try to move this legislation in the very near future.

We are aware of the wide interest in this legislation and will leave the subcommittee's record open for 1 week after this hearing for persons interested in submitting comments for consideration. However, it is my intention because the hour is late, and the number of legislative days that remain are fairly limited, to move forward as soon as possible and, again, trying to accommodate the wishes of people who have introduced legislation in this area, the various staff recommendations, employee group recommendations, administration recommendations is a challenge, but I think the draft proposal that we have does reach a good consensus and gives us an opportunity to make one last stab here at trying to incorporate some of these reforms in our civil service law.

So this is an important task, and today what we have done is brought together, hopefully, representation of various groups and agencies that will be affected by this proposed legislation, and my job is going to be unique today. I do not intend to ask any questions other than very basic questions, but more to listen to your thoughts.

As I said, with the time drawing rather short, I anticipate a quick markup and moving of this legislation. I also welcome, and personally invite, recommendations for any changes, whether minor or substantial, get them to me as soon as possible. I hope I am making myself clear on that point.

[The text of H.R. 3841 follows:]

104TH CONGRESS
2D SESSION

H.R. 3841

To amend the civil service laws of the United States, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 17, 1996

MR. MICA (FOR HIMSELF, MR. MORAN, AND MRS. MORELLA) INTRODUCED THE FOLLOWING BILL; WHICH WAS REFERRED TO THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

A BILL

To amend the civil service laws of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Omnibus Civil Service Reform Act of 1996".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

TITLE I—DEMONSTRATION PROJECTS

SEC. 101. DEMONSTRATION PROJECTS.

(a) DEFINITIONS.—Paragraph (1) of section 4701(a) of title 5, United States Code, is amended by striking subparagraph (A) and by redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively.

(b) PRE-IMPLEMENTATION PROCEDURES.—Subsection (b) of section 4703 of title 5, United States Code, is amended to read as follows:

"(b) Before an agency or the Office may conduct or enter into any agreement or contract to conduct a demonstration project, the Office—

"(1) shall develop or approve a plan for such project which identifies—

"(A) the purposes of the project;

"(B) the methodology;

"(C) the duration; and

"(D) the methodology and criteria for evaluation;

"(2) shall publish the plan in the Federal Register;

"(3) may solicit comments from the public and interested parties in such manner as the Office considers appropriate;

"(4) shall obtain approval from each agency involved of the final version of the plan; and

"(5) shall provide notification of the proposed project, at least 30 days in advance of the date any project proposed under this section is to take effect—

"(A) to employees who are likely to be affected by the project; and

"(B) to each House of the Congress.".

(c) NONWAIVABLE PROVISIONS.—Section 4703(c) of title 5, United States Code, is amended—

(1) by striking paragraph (1) and inserting the following:

"(1) any provision of subchapter V of chapter 63 or subpart G of this title;"; and

(2) by striking paragraph (3) and inserting the following:

"(3) any provision of chapter 15 or subchapter II or III of chapter 73 of this title;".

(d) LIMITATIONS.—Subsection (d) of section 4703 of title 5, United States Code, is amended to read as follows:

"(d)(1) Each demonstration project shall terminate before the end of the 5-year period beginning on the date on which the project takes effect, except that the project may continue for a maximum of 2 years beyond the date to the extent necessary to validate the results of the project.

"(2)(A) Not more than 15 active demonstration projects may be in effect at any time, and of the projects in effect at any time, not more than 5 may involve 5,000 or more individuals each.

"(B) Individuals in a control group necessary to validate the results of a project shall not, for purposes of any determination under subparagraph (A), be considered to be involved in such project.".

(e) CONDITION RELATING TO BARGAINING AGREEMENTS.—Paragraph (1) of section 4703(f) of title 5, United States Code, is amended by striking "(as defined in section 7103(8) of this title)" and inserting "(as defined in section 7103(8), excluding any agreements entered into or renewed after the date of the enactment of the Omnibus Civil Service Reform Act of 1996)".

(f) EVALUATIONS.—Subsection (h) of section 4703 of title 5, United States Code, is amended by adding at the end the following: "The Office may, with respect to a demonstration project conducted by another agency, require that the preceding sentence be carried out by such other agency.".

(g) PROVISIONS FOR TERMINATION OF PROJECT OR MAKING IT PERMANENT.—Section 4703 of title 5, United States Code, is amended—

(1) in subsection (i) by inserting "by the Office" after "undertaken"; and

(2) by adding at the end the following:

"(j)(1) If the Office determines that termination of a demonstration project (whether under subsection (e) or otherwise) would result in the inequitable treatment of employees who participated in the project, the Office shall take such corrective action as is within its authority. If the Office determines that legislation is necessary to correct an inequity, it shall submit an appropriate legislative proposal to both Houses of Congress.

"(2) If the Office determines that a demonstration project should be made permanent, it shall submit an appropriate legislative proposal to both Houses of Congress.".

TITLE II—SIMPLIFYING APPEALS

SEC. 201. ELIMINATION OF MIXED-CASE PROCEDURES.

(a) IN GENERAL.—Section 7702, paragraph (2) of section 7703(b), and the last sentence of section 7121(d) of title 5, United States Code, are repealed.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) The item relating to section 7702 in the table of sections at the beginning of chapter 77 of title 5, United States Code, is repealed.

(2) Section 7701(e)(1) of title 5, United States Code, is amended—

(A) by striking "(e)(1) Except as provided in section 7702 of this title, any" and inserting "(e) Any";

(B) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively; and

(C) by striking "subparagraph (A) of this paragraph." and inserting "paragraph (1).".

(3) Section 753(e)(1) of title 31, United States Code, is amended by striking "sections 7701 and 7702" and inserting "section 7701".

(4) Section 7703(c) of title 5, United States Code, is amended by striking the semicolon at the end of paragraph (3) and all that follows through "court." and inserting a period.

SEC. 202. APPEAL TO MERIT SYSTEMS PROTECTION BOARD AS EXCLUSIVE ADMINISTRATIVE REMEDY.

(a) IN GENERAL.—Section 7701(b)(1) of title 5, United States Code, is amended by striking "(b)(1)" and inserting "(b)(1)(A)" and by adding at the end the following:

"(B) Notwithstanding any other provision of law, rule, or regulation, an appeal under this section shall be the exclusive administrative remedy for any action by an employee or applicant who—

"(i) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board; and

"(ii) alleges that a basis for the action was discrimination prohibited by—

"(I) section 717 of the Civil Rights Act of 1964;

"(II) section 6(d) of the Fair Labor Standards Act of 1938;

"(III) section 501 of the Rehabilitation Act of 1973;

"(IV) sections 12 and 15 of the Age Discrimination in Employment Act of 1967; or

"(V) any rule, regulation, or policy directive prescribed under any provision of law described in subclauses (I) through (IV).

"(C) In lieu of filing an appeal under this section, an employee or applicant described in paragraph (B) may file a civil action under—

"(i) section 717(c) of the Civil Rights Act of 1964 or section 15(c) of the Age Discrimination in Employment Act of 1967, as applicable, within 90 days after receipt of notice of final action taken by the agency on a complaint of discrimination under a provision of law described in subclause (I), (III), or (IV) of subparagraph (B)(ii) or any rule, regulation, or policy directive prescribed under any such provision of law; or

"(ii) section 16(b) of the Fair Labor Standards Act of 1938 within 2 years (or, if the violation is willful, within 3 years) after the date of an alleged violation of section 6(d) of the Fair Labor Standards Act of 1938 or any rule, regulation, or policy directive prescribed thereunder.".

(b) PETITION FOR BOARD REVIEW.—(1) Section 7701(e)(1)(A) of title 5, United States Code, is amended by striking "a party to the appeal or the Director" and inserting "a party to the appeal, the Director, or the Equal Employment Opportunity Commission".

(2) Subsection (e) of section 7701 of title 5, United States Code, is amended by adding at the end the following:

"(3) The Equal Employment Opportunity Commission may petition the Board for review under paragraph (1) only if the Commission is of the opinion that the decision is erroneous and will have a substantial impact on any equal employment opportunity law, rule, or regulation under the jurisdiction of the Commission.".

(3) Subsection (d) of section 7703 of title 5, United States Code, is amended to read as follows:

"(d)(1) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.

"(2) The Equal Employment Opportunity Commission may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Commission determines, in its discretion, that the Board erred in interpreting an equal employment opportunity law and that the Board's decision will have a substantial impact on an equal employment opportunity law, rule, regulation, or policy directive.

"(3) If the Director or the Commission did not intervene in a matter before the Board, the Director or the Commission may not petition for review of a Board decision under this section unless the Director or the Commission first petitions the Board for reconsideration of its decision, and such petition is denied.

"(4) In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for review shall be at the discretion of the Court of Appeals, except that it may not deny a petition for review solely because it disagrees with the determination of the Director or the Commission that the Board's decision will have a substantial impact on a law, rule, regulation, or pol-

icy directive within their jurisdiction. The Court of Appeals shall require payment by the Director or the Commission, as appropriate, of reasonable attorney fees incurred by the other parties if, after rendering a decision on the merits of the petition, the court determines that the Board's decision would not have had a substantial impact on a law, rule, regulation, or policy directive within their jurisdiction.".

SEC. 203. AGENCY FLEXIBILITY AND ENCOURAGING THE USE OF ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES.

(a) IN GENERAL.—Chapter 77 of title 5, United States Code, is amended by adding at the end the following:

"§ 7704. Alternative dispute resolution techniques

"Notwithstanding any other provision of law, each agency (including the United States Postal Service, the Postal Rate Commission, and the Tennessee Valley Authority) shall have the authority to develop an internal procedure under which its employees may file with the agency a complaint of discrimination by the agency under the laws described in subclauses (I) through (V) of section 7701(b)(1)(B)(ii), or any other matter appealable to the Merit Systems Protection Board or the Federal Labor Relations Authority. Agencies are encouraged to use alternative dispute resolution techniques in order to resolve such complaints. An agency may require its employees to exhaust such internal procedure for a period not to exceed 90 days before seeking external administrative or judicial review under this chapter. To the extent that a private entity may do so, an agency may require employees to submit to alternative dispute resolution techniques in lieu of other administrative or judicial review.".

(b) TASK FORCE.—In order to encourage the use of alternative dispute resolution techniques in resolving personnel-related disputes within the Federal Government, the Chairman of the Merit Systems Protection Board shall, in consultation with the Chairman of the Equal Employment Opportunity Commission, the Chairman of the Federal Labor Relations Authority, the Director of the Office of Personnel Management, the Special Counsel, and the Director of the Federal Mediation and Conciliation Service, organize and chair a task force—

(1) to study and evaluate the use of alternative dispute resolution techniques in resolving Federal personnel disputes;

(2) to facilitate the exchange of information between agencies;

(3) to examine and evaluate alternative dispute resolution techniques used in the private sector for possible application to Federal personnel disputes; and

(4) to issue a report to Congress no later than 18 months after the date of enactment of this Act on the use of alternative dispute resolution techniques in personnel disputes by Federal agencies, including Federal adjudicatory agencies.

The Merit Systems Protection Board shall provide administrative support to the task force.

SEC. 204. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise provided in this section, this title and the amendments made by this title shall take effect 6 months after the date of the enactment of this Act.

(b) TASK FORCE.—Subsection (b) of section 203 shall take effect on the date of the enactment of this Act.

(c) SAVINGS PROVISION.—Matters or proceedings pending as of, and continuing after, the effective date of this title shall continue as if this title had not been enacted.

TITLE III—PERFORMANCE MANAGEMENT ENHANCEMENT

SEC. 301. INCREASED WEIGHT GIVEN TO PERFORMANCE FOR ORDER-OF-RETENTION PURPOSES IN A REDUCTION IN FORCE.

(a) IN GENERAL.—Section 3502 of title 5, United States Code, is amended—

(1) in subsection (a)(4) by striking "ratings." and inserting "ratings, in conformance with the requirements of subsection (g)."; and

(2) by adding at the end the following:

"(g)(1) The regulations prescribed to carry out subsection (a)(4) shall be the regulations in effect, as of January 1, 1996, under section 351.504 of title 5 of the Code of Federal Regulations, except as otherwise provided in this subsection.

"(2) For purposes of this subsection—

"(A) subsections (b)(4) and (e) of such section 351.504 shall be disregarded;

"(B) subsection (d) of such section 351.504 shall be considered to read as follows:

"'(d)(1) The additional service credit an employee receives for performance under this subpart shall be expressed in additional years of service and shall consist of the sum of the employee's 3 most recent (actual and/or assumed) annual performance ratings received during the 4-year period prior to the date of issuance of reduction-in-force notices or the 4-year period prior to the agency-established cutoff date (as appropriate), computed in accordance with paragraph (2) or (3) (as appropriate).

"'(2) Except as provided in paragraph (3), an employee shall receive—

"'(A) 5 additional years of service for each performance rating of fully successful (Level 3) or equivalent;

"'(B) 7 additional years of service for each performance rating of exceeds fully successful (Level 4) or equivalent; and

"'(C) 10 additional years of service for each performance rating of outstanding (Level 5) or equivalent.

"'(3)(A) If the employing agency uses a rating system having only 1 rating to denote performance which is fully successful or better, then an employee under such system shall receive 5 additional years of service for each such rating.

"'(B) If the employing agency uses a rating system having only 2 ratings to denote performance which is fully successful or better, then an employee under such system shall receive—

"'(i) 5 additional years of service for each performance rating at the lower of those 2 ratings; and

"'(ii) 7 additional years of service for each performance rating at the higher of those 2 ratings.

"'(C) If the employing agency uses a rating system having 3 or more ratings to denote performance which is fully successful or better, then an employee under such system shall receive—

"'(i) 5 additional years of service for each performance rating at the lowest of those 3 or more ratings;

"'(ii) 7 additional years of service for each performance rating at the next rating above the rating referred to in clause (i); and

"'(iii) 10 additional years of service for each performance rating above the rating referred to in clause (ii).

"'(D) For purposes of this paragraph, a rating shall not be considered to denote performance which is fully successful or better unless, in order to receive such rating, such performance must satisfy all requirements for a fully successful rating (Level 3) or equivalent, as established under part 430 of this chapter (as in effect as of January 1, 1996).'; and

"(C) subsection (c) of such section shall be considered to read as follows:

"'(c)(1) Service credit for employees who do not have 3 actual annual performance ratings of record received during the 4-year period prior to the date of issuance of reduction-in-force notices, or the 4-year period prior to the agency-established cutoff date for ratings permitted in subsection (b)(2) of this section, shall be determined in accordance with paragraph (2).

"'(2) An employee who has not received 1 or more of the 3 annual performance ratings of record required under this section shall—

"'(A) receive credit for performance on the basis of the rating or ratings actually received (if any); and

"'(B) for each performance rating not actually received, be given credit for 5 additional years of service.'.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to reductions in force taking effect on or after October 1, 1999.

SEC. 302. NO APPEAL OF DENIAL OF PERIODIC STEP-INCREASES.

(a) IN GENERAL.—Section 5335(c) of title 5, United States Code, is amended—

(1) by striking the second sentence;

(2) in the third sentence by striking "or appeal"; and

(3) in the last sentence by striking "and the entitlement of the employee to appeal to the Board do not apply" and inserting "does not apply".

(b) PERFORMANCE RATINGS.—Section 5335 of title 5, United States Code, as amended by subsection (a), is further amended—

(1) in subsections (a)(B) and (c) by striking "of an acceptable level of competence" and inserting "at least fully successful";

(2) in the last sentence of subsection (c) by striking "acceptable level of competence" and inserting "fully successful work performance"; and

(3) by adding at the end the following:

"(g) For purposes of this section, the term 'fully successful' has a meaning similar to that given under section 351.504(d)(3)(D) of title 5 of the Code of Federal Reg-

ulations (as deemed to be amended by section 301(a)(2) of the Omnibus Civil Service Reform Act of 1996).".

SEC. 303. PERFORMANCE APPRAISALS.

(a) IN GENERAL.—Section 4302 of title 5, United States Code, is amended—

(1) in subsection (b) by striking paragraphs (5) and (6) and inserting the following:

"(5) assisting employees in improving unacceptable performance, except in circumstances described in subsection (c); and

"(6) reassigning, reducing in grade, removing, or taking other appropriate action against employees whose performance is unacceptable."; and

(2) by adding at the end the following:

"(c) Upon notification of unacceptable performance, an employee shall be afforded an opportunity to demonstrate acceptable performance before a reduction in grade or removal may be proposed under section 4303 based on such performance, except that an employee so afforded such an opportunity shall not be afforded any further opportunity to demonstrate acceptable performance if the employee's performance again is determined to be at an unacceptable level.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), this section and the amendments made by this section shall take effect 180 days after the date of the enactment of this Act.

(2) EXCEPTION.—The amendments made by this section shall not apply in the case of any proposed action as to which the employee receives advance written notice, in accordance with section 4303(b)(1)(A) of title 5, United States Code, before the effective date of this section.

SEC. 304. AMENDMENTS TO INCENTIVE AWARDS AUTHORITY.

Chapter 45 of title 5, United States Code, is amended—

(1) by amending section 4501 to read as follows:

"§ 4501. Definitions

"For the purpose of this subchapter—

"(1) the term 'agency' means—

"(A) an Executive agency;

"(B) the Library of Congress;

"(C) the Office of the Architect of the Capitol;

"(D) the Botanic Garden;

"(E) the Government Printing Office; and

"(F) the United States Sentencing Commission;

but does not include—

"(i) the Tennessee Valley Authority; or

"(ii) the Central Bank for Cooperatives;

"(2) the term 'employee' means an employee as defined by section 2105; and

"(3) the term 'Government' means the Government of the United States."; and

(2) by amending section 4503 to read as follows:

"§ 4503. Agency awards

"(a) The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who—

"(1) by his suggestion, invention, superior accomplishment, sustained superior performance, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork; or

"(2) performs a special act or service in the public interest in connection with or related to his official employment.

"(b)(1) If the criteria under paragraph (1) or (2) of subsection (a) are met on the basis of the suggestion, invention, superior accomplishment, act, service, or other meritorious effort of a group of employees collectively, and if the circumstances so warrant (such as by reason of the infeasibility of determining the relative role or contribution assignable to each employee separately), authority under subsection (a) may be exercised—

"(A) based on the collective efforts of the group; and

"(B) with respect to each member of such group.

"(2) The amount awarded to each member of a group under this subsection—

"(A) shall be the same for all members of such group; and

"(B) may not exceed the maximum cash award allowable under subsection (a) or (b) of section 4502, as applicable.".

SEC. 305. DUE PROCESS RIGHTS OF MANAGERS UNDER NEGOTIATED GRIEVANCE PROCEDURES.

(a) IN GENERAL.—Paragraph (2) of section 7121(b) of title 5, United States Code, is amended to read as follows:

"(2) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a)—

(1) shall take effect on the date of the enactment of this Act; and

(2) shall apply with respect to orders issued on or after the date of the enactment of this Act, notwithstanding the provisions of any collective bargaining agreement.

SEC. 306. COLLECTION AND REPORTING OF TRAINING INFORMATION.

(a) TRAINING WITHIN GOVERNMENT.—The Office of Personnel Management shall collect information concerning training programs, plans, and methods utilized by agencies of the Government and submit a report to the Congress on this activity on an annual basis.

(b) TRAINING OUTSIDE OF GOVERNMENT.—The Office of Personnel Management, to the extent it considers appropriate in the public interest, may collect information concerning training programs, plans, and methods utilized outside the Government. The Office, on request, may make such information available to an agency and to Congress.

TITLE IV—ENHANCEMENT OF THRIFT SAVINGS PLAN AND CERTAIN OTHER BENEFITS

Subtitle A—Additional Investment Funds for the Thrift Savings Plan

SEC. 401. SHORT TITLE.

This subtitle may be cited as the "Thrift Savings Investment Funds Act of 1996".

SEC. 402. ADDITIONAL INVESTMENT FUNDS FOR THE THRIFT SAVINGS PLAN.

Section 8438 of title 5, United States Code, is amended—

(1) in subsection (a)—

(A) by redesignating paragraphs (5) through (8) as paragraphs (6) through (9), respectively;

(B) by inserting after paragraph (4) the following new paragraph:

"(5) the term 'International Stock Index Investment Fund' means the International Stock Index Investment Fund established under subsection (b)(1)(E);";

(C) in paragraph (8) (as redesignated by subparagraph (A) of this paragraph) by striking out "and" at the end thereof;

(D) in paragraph (9) (as redesignated by subparagraph (A) of this paragraph)—

(i) by striking out "paragraph (7)(D)" in each place it appears and inserting in each such place "paragraph (8)(D)"; and

(ii) by striking out the period and inserting in lieu thereof a semicolon and "and"; and

(E) by adding at the end thereof the following new paragraph:

"(10) the term 'Small Capitalization Stock Index Investment Fund' means the Small Capitalization Stock Index Investment Fund established under subsection (b)(1)(D).."; and

(2) in subsection (b)—

(A) in paragraph (1)—

(i) in subparagraph (B) by striking out "and" at the end thereof;

(ii) in subparagraph (C) by striking out the period and inserting in lieu thereof a semicolon; and

(iii) by adding at the end thereof the following new subparagraphs:

"(D) a Small Capitalization Stock Index Investment Fund as provided in paragraph (3); and

"(E) an International Stock Index Investment Fund as provided in paragraph (4).."; and

(B) by adding at the end thereof the following new paragraphs:

"(3)(A) The Board shall select an index which is a commonly recognized index comprised of common stock the aggregate market value of which represents the

United States equity markets excluding the common stocks included in the Common Stock Index Investment Fund.

"(B) The Small Capitalization Stock Index Investment Fund shall be invested in a portfolio designed to replicate the performance of the index in subparagraph (A). The portfolio shall be designed such that, to the extent practicable, the percentage of the Small Capitalization Stock Index Investment Fund that is invested in each stock is the same as the percentage determined by dividing the aggregate market value of all shares of that stock by the aggregate market value of all shares of all stocks included in such index.

"(4)(A) The Board shall select an index which is a commonly recognized index comprised of stock the aggregate market value of which is a reasonably complete representation of the international equity markets excluding the United States equity markets.

"(B) The International Stock Index Investment Fund shall be invested in a portfolio designed to replicate the performance of the index in subparagraph (A). The portfolio shall be designed such that, to the extent practicable, the percentage of the International Stock Index Investment Fund that is invested in each stock is the same as the percentage determined by dividing the aggregate market value of all shares of that stock by the aggregate market value of all shares of all stocks included in such index.".

SEC. 403. ACKNOWLEDGEMENT OF INVESTMENT RISK.

Section 8439(d) of title 5, United States Code, is amended by striking out "Each employee, Member, former employee, or former Member who elects to invest in the Common Stock Index Investment Fund or the Fixed Income Investment Fund described in paragraphs (1) and (3)," and inserting in lieu thereof "Each employee, Member, former employee, or former Member who elects to invest in the Common Stock Index Investment Fund, the Fixed Income Investment Fund, the International Stock Index Investment Fund, or the Small Capitalization Stock Index Investment Fund, defined in paragraphs (1), (3), (5), and (10),".

SEC. 404. EFFECTIVE DATE.

This subtitle shall take effect on the date of enactment of this Act, and the Funds established under this subtitle shall be offered for investment at the earliest practicable election period (described in section 8432(b) of title 5, United States Code) as determined by the Executive Director in regulations.

Subtitle B—Thrift Savings Account Liquidity

SEC. 411. SHORT TITLE.

This subtitle may be cited as the "Thrift Savings Plan Act of 1996".

SEC. 412. NOTICE TO SPOUSES FOR IN-SERVICE WITHDRAWALS; DE MINIMUS ACCOUNTS; CIVIL SERVICE RETIREMENT SYSTEM PARTICIPANTS.

Section 8351(b) of title 5, United States Code, is amended—

(1) in paragraph (5)—

(A) in subparagraph (B)—

(i) by striking out "An election, change of election, or modification (relating to the commencement date of a deferred annuity)" and inserting in lieu thereof "An election or change of election";

(ii) by inserting "or withdrawal" after "and a loan";

(iii) by inserting "and (h)" after "8433(g)";

(iv) by striking out "the election, change of election, or modification" and inserting in lieu thereof "the election or change of election"; and

(v) by inserting "or withdrawal" after "for such loan"; and

(B) in subparagraph (D)—

(i) by inserting "or withdrawals" after "of loans"; and

(ii) by inserting "or (h)" after "8433(g)"; and

(2) in paragraph (6)—

(A) by striking out "$3,500 or less" and inserting in lieu thereof "less than an amount that the Executive Director prescribes by regulation"; and

(B) by striking out "unless the employee or Member elects, at such time and otherwise in such manner as the Executive Director prescribes, one of the options available under subsection (b)".

SEC. 413. IN-SERVICE WITHDRAWALS; WITHDRAWAL ELECTIONS, FEDERAL EMPLOYEES RETIREMENT SYSTEM PARTICIPANTS.

(a) IN GENERAL.—Section 8433 of title 5, United States Code, is amended—

(1) by striking out subsections (b) and (c) and inserting in lieu thereof the following:

"(b) Subject to section 8435 of this title, any employee or Member who separates from Government employment is entitled and may elect to withdraw from the Thrift Savings Fund the balance of the employee's or Member's account as—

"(1) an annuity;

"(2) a single payment;

"(3) 2 or more substantially equal payments to be made not less frequently than annually; or

"(4) any combination of payments as provided under paragraphs (1) through (3) as the Executive Director may prescribe by regulation.

"(c)(1) In addition to the right provided under subsection (b) to withdraw the balance of the account, an employee or Member who separates from Government service and who has not made a withdrawal under subsection (h)(1)(A) may make one withdrawal of any amount as a single payment in accordance with subsection (b)(2) from the employee's or Member's account.

"(2) An employee or Member may request that the amount withdrawn from the Thrift Savings Fund in accordance with subsection (b)(2) be transferred to an eligible retirement plan.

"(3) The Executive Director shall make each transfer elected under paragraph (2) directly to an eligible retirement plan or plans (as defined in section 402(c)(8) of the Internal Revenue Code of 1986) identified by the employee, Member, former employee, or former Member for whom the transfer is made.

"(4) A transfer may not be made for an employee, Member, former employee, or former Member under paragraph (2) until the Executive Director receives from that individual the information required by the Executive Director specifically to identify the eligible retirement plan or plans to which the transfer is to be made.";

(2) in subsection (d)—

(A) in paragraph (1) by striking out "Subject to paragraph (3)(A)" and inserting in lieu thereof "Subject to paragraph (3)";

(B) by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2); and

(C) in paragraph (2) (as redesignated under subparagraph (B) of this paragraph)—

(i) in subparagraph (A) by striking out "(A)"; and

(ii) by striking out subparagraph (B);

(3) in subsection (f)(1)—

(A) by striking out "$3,500 or less" and inserting in lieu thereof "less than an amount that the Executive Director prescribes by regulation; and

(B) by striking out "unless the employee or Member elects, at such time and otherwise in such manner as the Executive Director prescribes, one of the options available under subsection (b), or" and inserting a comma;

(4) in subsection (f)(2)—

(A) by striking out "February 1" and inserting in lieu thereof "April 1";

(B) in subparagraph (A)—

(i) by striking out "65" and inserting in lieu thereof "70½"; and

(ii) by inserting "or" after the semicolon;

(C) by striking out subparagraph (B); and

(D) by redesignating subparagraph (C) as subparagraph (B);

(5) in subsection (g)—

(A) in paragraph (1) by striking out "after December 31, 1987, and"; and

(B) by striking out paragraph (2) and redesignating paragraphs (3) through (5) as paragraphs (2) through (4), respectively; and

(6) by adding after subsection (g) the following new subsection:

"(h)(1) An employee or Member may apply, before separation, to the Board for permission to withdraw an amount from the employee's or Member's account based upon—

"(A) the employee or Member having attained age 59½; or

"(B) financial hardship.

"(2) A withdrawal under paragraph (1)(A) shall be available to each eligible participant one time only.

"(3) A withdrawal under paragraph (1)(B) shall be available only for an amount not exceeding the value of that portion of such account which is attributable to contributions made by the employee or Member under section 8432(a) of this title.

"(4) Withdrawals under paragraph (1) shall be subject to such other conditions as the Executive Director may prescribe by regulation.

"(5) A withdrawal may not be made under this subsection unless the requirements of section 8435(e) of this title are satisfied.".

(b) INVALIDITY OF CERTAIN PRIOR ELECTIONS.—Any election made under section 8433(b)(2) of title 5, United States Code (as in effect before the effective date of this title), with respect to an annuity which has not commenced before the implementation date of this title as provided by regulation by the Executive Director in accordance with section 407, shall be invalid.

SEC. 414. SURVIVOR ANNUITIES FOR FORMER SPOUSES; NOTICE TO FEDERAL EMPLOYEES RETIREMENT SYSTEM SPOUSES FOR IN-SERVICE WITHDRAWALS.

Section 8435 of title 5, United States Code, is amended—

(1) in subsection (a)(1)(A)—

(A) by striking out "may make an election under subsection (b)(3) or (b)(4) of section 8433 of this title or change an election previously made under subsection (b)(1) or (b)(2) of such section" and inserting in lien thereof "may withdraw all or part of a Thrift Savings Fund account under subsection (b) (2), (3), or (4) of section 8433 of this title or change a withdrawal election"; and

(B) by adding at the end thereof "A married employee or Member (or former employee or Member) may make a withdrawal from a Thrift Savings Fund account under subsection (c)(1) of section 8433 of this title only if the employee or Member (or former employee or Member) satisfies the requirements of subparagraph (B).";

(2) in subsection (c)—

(A) in paragraph (1)—

(i) by striking out "An election, change of election, or modification of the commencement date of a deferred annuity" and inserting in lieu thereof "An election or change of election"; and

(ii) by striking out "modification, or transfer" and inserting in lien thereof "or transfer"; and

(B) in paragraph (2) in the matter following subparagraph (B)(ii) by striking out "modification,";

(3) in subsection (e)—

(A) in paragraph (1)—

(i) in subparagraph (A)—

(I) by inserting "or withdrawal" after "A loan";

(II) by inserting "and (h)" after "8433(g)"; and

(III) by inserting "or withdrawal" after "such loan";

(ii) in subparagraph (B) by inserting "or withdrawal" after "loan"; and

(iii) in subparagraph (C)—

(I) by inserting "or withdrawal" after "to a loan"; and

(II) by inserting "or withdrawal" after "for such loan"; and

(B) in paragraph (2)—

(i) by inserting "or withdrawal" after "loan"; and

(ii) by inserting "and (h)" after "8344(g)"; and

(4) in subsection (g)—

(A) by inserting "or withdrawals" after "loans"; and

(B) by inserting "and (h)" after "8344(g)".

SEC. 415. DE MINIMUS ACCOUNTS RELATING TO THE JUDICIARY.

(a) JUSTICES AND JUDGES.—Section 8440a(b)(7) of title 5, United States Code, is amended—

(1) by striking out "$3,500 or less" and inserting in lieu thereof "less than an amount that the Executive Director prescribes by regulation"; and

(2) by striking out "unless the justice or judge elects, at such time and otherwise in such manner as the Executive Director prescribes, one of the options available under section 8433(b)".

(b) BANKRUPTCY JUDGES AND MAGISTRATES.—Section 8440b(b) of title 5, United States Code, is amended—

(1) in paragraph (7) in the first sentence by inserting "of the distribution" after "equal to the amount"; and

(2) in paragraph (8)—

(A) by striking out "$3,500 or less" and inserting in lieu thereof "less than an amount that the Executive Director prescribes by regulation"; and

(B) by striking out "unless the bankruptcy judge or magistrate elects, at such time and otherwise in such manner as the Executive Director prescribes, one of the options available under subsection (b)".

(c) FEDERAL CLAIMS JUDGES.—Section 8440c(b) of title 5, United States Code, is amended—

(1) in paragraph (7) in the first sentence by inserting "of the distribution" after "equal to the amount"; and

(2) in paragraph (8)—

(A) by striking out "$3,500 or less" and inserting in lieu thereof "less than an amount that the Executive Director prescribes by regulation"; and

(B) by striking out "unless the judge elects, at such time and otherwise in such manner as the Executive Director prescribes, one of the options available under section 8433(b)".

SEC. 416. DEFINITION OF BASIC PAY.

(a) IN GENERAL.—(1) Section 8401(4) of title 5, United States Code, is amended by striking out "except as provided in subchapter III of this chapter,".

(2) Section 8431 of title 5, United States Code, is repealed.

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) The table of sections for chapter 84 of title 5, United States Code, is amended by striking out the item relating to section 8431.

(2) Section 5545a(h)(2)(A) of title 5, United States Code, is amended by striking out "8431,".

(3) Section 615(f) of the Treasury, Postal Service, and General Government Appropriations Act, 1996 (Public Law 104–52; 109 Stat. 500; 5 U.S.C. 5343 note) is amended by striking out "section 8431 of title 5, United States Code,".

SEC. 417. ELIGIBLE ROLLOVER DISTRIBUTIONS.

Section 8432 of title 5, United States Code, is amended by adding at the end the following:

"(j)(1) For the purpose of this subsection—

"(A) the term 'eligible rollover distribution' has the meaning given such term by section 402(c)(4) of the Internal Revenue Code of 1986; and

"(B) the term 'qualified trust' has the meaning given such term by section 402(c)(8) of the Internal Revenue Code of 1986.

"(2) An employee or Member may contribute to the Thrift Savings Fund an eligible rollover distribution from a qualified trust. A contribution made under this subsection shall be made in the form described in section 401(a)(31) of the Internal Revenue Code of 1986. In the case of an eligible rollover distribution, the maximum amount transferred to the Thrift Savings Fund shall not exceed the amount which would otherwise have been included in the employee's or Member's gross income for Federal income tax purposes.

"(3) The Executive Director shall prescribe regulations to carry out this subsection.".

SEC. 418. EFFECTIVE DATE.

This subtitle shall take effect on the date of the enactment of this Act and withdrawals and elections as provided under the amendments made by this subtitle shall be made at the earliest practicable date as determined by the Executive Director in regulations.

Subtitle C—Other Provisions Relating to the Thrift Savings Plan

SEC. 421. PERCENTAGE LIMITATIONS ON CONTRIBUTIONS.

(a) AMENDMENTS RELATING TO FERS.—

(1) IN GENERAL.—Subsection (a) of section 8432 of title 5, United States Code, is amended by striking "10 percent of".

(2) JUSTICES AND JUDGES.—Subsection (b) of section 8440a of title 5, United States Code, is amended—

(A) by striking paragraph (2) and by redesignating paragraphs (3) through (7) as paragraphs (2) through (6), respectively; and

(B) in paragraph (6) (as so redesignated by subparagraph (A)) by striking "paragraphs (4) and (5)" and inserting "paragraphs (3) and (4)".

(3) BANKRUPTCY JUDGES AND MAGISTRATES.—Subsection (b) of section 8440b of title 5, United States Code, is amended—

(A) by striking paragraph (2) and by redesignating paragraphs (3) through (8) as paragraphs (2) through (7), respectively;

(B) in paragraph (4) (as so redesignated by subparagraph (A)) by striking "paragraph (4)(A), (B), or (C)" and inserting "paragraph (3)(A), (B), or (C)"; and

(C) in paragraph (7) (as so redesignated by subparagraph (A)) by striking "Notwithstanding paragraph (4)," and inserting "Notwithstanding paragraph (3),".

(4) COURT OF FEDERAL CLAIMS JUDGES.—Subsection (b) of section 8440c of title 5, United States Code, is amended—

(A) by striking paragraph (2) and by redesignating paragraphs (3) through (8) as paragraphs (2) through (7), respectively;

(B) in paragraph (4) (as so redesignated by subparagraph (A)) by striking "paragraph (4)(A) or (B)" and inserting "paragraph (3)(A) or (B)"; and

(C) in paragraph (7) (as so redesignated by subparagraph (A)) by striking "Notwithstanding paragraph (4)," and inserting "Notwithstanding paragraph (3),".

(5) JUDGES OF THE UNITED STATES COURT OF VETERANS APPEALS.—Paragraph (2) of section 8440d(b) of title 5, United States Code, is amended to read as follows:

"(2) For purposes of contributions made to the Thrift Savings Fund, basic pay does not include any retired pay paid pursuant to section 7296 of title 38.".

(b) AMENDMENTS RELATING TO CSRS.—Paragraph (2) of section 8351(b) of title 5, United States Code, is amended by striking "5 percent of".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall take effect 6 months after the date of the enactment of this Act or such earlier date as the Executive Director may by regulation prescribe.

(2) COORDINATION WITH ELECTION PERIODS.—The Executive Director shall by regulation determine the first election period in which elections may be made consistent with the amendments made by this section.

(3) DEFINITIONS.—For purposes of this subsection—

(A) the term "election period" means a period afforded under section 8432(b) of title 5, United States Code; and

(B) the term "Executive Director" has the meaning given such term by section 8401(13) of title 5, United States Code.

SEC. 422. LOANS UNDER THE THRIFT SAVINGS PLAN FOR FURLOUGHED EMPLOYEES.

Section 8433(g) of title 5, United States Code, is amended by adding at the end the following:

"(6) An employee who has been furloughed due to a lapse in appropriations may not be denied a loan under this subsection solely because such employee is not in a pay status.".

SEC. 423. IMMEDIATE PARTICIPATION IN THE THRIFT SAVINGS PLAN.

(a) ELIMINATION OF CERTAIN WAITING PERIODS FOR PURPOSES OF EMPLOYEE CONTRIBUTIONS.—Paragraph (4) of section 8432(b) of title 5, United States Code, is amended to read as follows:

"(4) The Executive Director shall prescribe such regulations as may be necessary to carry out the following:

"(A) Notwithstanding subparagraph (A) of paragraph (2), an employee or Member described in such subparagraph shall be afforded a reasonable opportunity to first make an election under this subsection beginning on the date of commencing service or, if that is not administratively feasible, beginning on the earliest date thereafter that such an election becomes administratively feasible, as determined by the Executive Director.

"(B) An employee or Member described in subparagraph (B) of paragraph (2) shall be afforded a reasonable opportunity to first make an election under this subsection (based on the appointment or election described in such subparagraph) beginning on the date of commencing service pursuant to such appointment or election or, if that is not administratively feasible, beginning on the earliest date thereafter that such an election becomes administratively feasible, as determined by the Executive Director.

"(C) Notwithstanding the preceding provisions of this paragraph, contributions under paragraphs (1) and (2) of subsection (c) shall not be payable with respect to any pay period before the earliest pay period for which such contributions would otherwise be allowable under this subsection if this paragraph had not been enacted.

"(D) Sections 8351(a)(2), 8440a(a)(2), 8440b(a)(2), 8440c(a)(2), and 8440d(a)(2) shall be applied in a manner consistent with the purposes of subparagraphs (A) and (B), to the extent those subparagraphs can be applied with respect thereto.

"(E) Nothing in this paragraph shall affect paragraph (3).".

(b) TECHNICAL AND CONFORMING AMENDMENTS.—(1) Section 8432(a) of title 5, United States Code, is amended—

(A) in the first sentence by striking "(b)(1)" and inserting "(b)"; and

(B) by amending the second sentence to read as follows: "Contributions under this subsection pursuant to such an election shall, with respect to each pay period for which such election remains in effect, be made in accordance with a program of regular contributions provided in regulations prescribed by the Executive Director.".

(2) Section 8432(b)(1)(B) of such title is amended by inserting "(or any election allowable by virtue of paragraph (4))" after "subparagraph (A)".

(3) Section 8432(b)(3) of such title is amended by striking "Notwithstanding paragraph (2)(A), an" and inserting "An".

(4) Section 8432(i)(1)(B)(ii) of such title is amended by striking "either elected to terminate individual contributions to the Thrift Savings Fund within 2 months before commencing military service or".

(5) Section 8439(a)(1) of such title is amended by inserting "who makes contributions or" after "for each individual" and by striking "section 8432(c)(1)" and inserting "section 8432".

(6) Section 8439(c)(2) of such title is amended by adding at the end the following: "Nothing in this paragraph shall be considered to limit the dissemination of information only to the times required under the preceding sentence.".

(7) Sections 8440a(a)(2) and 8440d(a)(2) of such title are amended by striking all after "subject to" and inserting "subject to this chapter.".

(c) EFFECTIVE DATE.—This section shall take effect 6 months after the date of the enactment of this Act or such earlier date as the Executive Director (within the meaning of section 8401(13) of title 5, United States Code) may by regulation prescribe.

Subtitle D—Resumption of Certain Survivor Annuities That Terminated by Reason of Marriage

SEC. 431. RESUMPTION OF CERTAIN SURVIVOR ANNUITIES THAT TERMINATED BY REASON OF MARRIAGE.

(a) CIVIL SERVICE RETIREMENT SYSTEM.—Section 8341(e) of title 5, United States Code, is amended by adding at the end the following:

"(4) If the annuity of a child under this subchapter terminates under paragraph (3)(E) because of marriage, then, if such marriage ends (whether by death of the spouse, divorce, or annulment), such annuity shall resume on the first day of the month in which the marriage ends, but only if—

"(A) any lump sum paid is returned to the Fund; and

"(B) that individual is not otherwise ineligible for such annuity.".

(b) FEDERAL EMPLOYEES' RETIREMENT SYSTEM.—Section 8443(b) of such title is amended by adding at the end the following: "If the annuity of a child under this subchapter terminates under subparagraph (E) because of marriage, then, if such marriage ends (whether by death of the spouse, divorce, or annulment), such annuity shall resume on the first day of the month in which the marriage ends, but only if any lump sum paid is returned to the Fund, and that individual is not otherwise ineligible for such annuity.".

(c) HEALTH BENEFITS PROGRAM.—Section 8908 of title 5, United States Code, is amended by adding at the end the following:

"(d) An individual—

"(1) whose survivor annuity under section 8341(e) is terminated, and then later restored under paragraph (4) thereof, or

"(2) whose survivor annuity under section 8443(b) is terminated, and then later restored under the last sentence thereof,

may, under regulations prescribed by the Office, enroll in a health benefits plan described by section 8903 or 8903a if such individual was covered by any such plan immediately before such annuity so terminated.".

(d) APPLICABILITY.—The amendments made by this section shall apply with respect to any termination of marriage taking effect before, on, or after the date of the enactment of this Act, except that no amount shall be payable by reason of the amendments made by subsections (a) and (b), respectively, except to the extent of any amounts accruing for periods beginning on or after the first day of the first month beginning on or after the later of—

(1) the date of the enactment of this Act; or

(2) the date as of which termination of marriage takes effect.

Subtitle E—Life Insurance Benefits

SEC. 441. DOMESTIC RELATIONS ORDERS.

(a) IN GENERAL.—Section 8705 of title 5, United States Code, is amended—

(1) in subsection (a) by striking "(a) The" and inserting "(a) Except as provided in subsection (e), the"; and

(2) by adding at the end the following:

"(e)(1) Any amount which would otherwise be paid to a person determined under the order of precedence named by subsection (a) shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.

"(2) For purposes of this subsection, a decree, order, or agreement referred to in paragraph (1) shall not be effective unless it is received, before the date of the covered employee's death, by the employing agency or, if the employee has separated from service, by the Office.

"(3) A designation under this subsection with respect to any person may not be changed except—

"(A) with the written consent of such person, if received as described in paragraph (2); or

"(B) by modification of the decree, order, or agreement, as the case may be, if received as described in paragraph (2).

"(4) The Office shall prescribe any regulations necessary to carry out this subsection, including regulations for the application of this subsection in the event that 2 or more decrees, orders, or agreements, are received with respect to the same amount.".

(b) DIRECTED ASSIGNMENT.—Section 8706(e) of title 5, United States Code, is amended—

(1) by striking "(e)" and inserting "(e)(1)"; and

(2) by adding at the end the following:

"(2) A court decree of divorce, annulment, or legal separation, or the terms of a court-approved property settlement agreement incidental to any court decree of divorce, annulment, or legal separation, may direct that an insured employee or former employee make an irrevocable assignment of the employee's or former employee's incidents of ownership in insurance under this chapter (if there is no previous assignment) to the person specified in the court order or court-approved property settlement agreement.".

SEC. 442. EXCEPTION FROM PROVISIONS REQUIRING REDUCTION IN ADDITIONAL OPTIONAL LIFE INSURANCE.

(a) IN GENERAL.—Subsection (c) of section 8714b of title 5, United States Code, is amended by adding at the end the following:

"(3)(A) The amount of additional optional insurance continued under paragraph (2) shall be continued, without any reduction under the last two sentences thereof, if—

"(i) at the time of retirement, there is in effect a designation under section 8705 under which the entire amount of such insurance would be paid to an individual who is permanently disabled; and

"(ii) an election under subsection (d)(3) on behalf of such individual is made in timely fashion.

"(B) Notwithstanding subparagraph (A), any reduction required under paragraph (2) shall be made if—

"(i) the additional optional insurance is not in fact paid in accordance with the designation under section 8705, as in effect at the time of retirement;

"(ii) the Office finds that adequate arrangements have not been made to ensure that the insurance provided under this section will be used only for the care and support of the individual so designated; or

"(iii) the election referred to in subparagraph (A)(ii) terminates at any time before the death of the individual who made such election.

"(C) For purposes of this paragraph, the term 'permanently disabled' shall have the meaning given such term under regulations which the Office shall prescribe based on subparagraphs (A) and (C) of section 1614(a)(3) of the Social Security Act, except that, in applying subparagraph (A) of such section for purposes of this subparagraph, 'which can be expected to last permanently' shall be substituted for 'which has lasted or can be expected to last for a continuous period of not less than twelve months'.".

(b) CONTINUED WITHHOLDINGS.—Subsection (d) of such section 8714b is amended by adding at the end the following:

"(3)(A) To be eligible for unreduced additional optional insurance under subsection (c)(3), the insured individual shall be required to elect, at such time and in such manner as the Office by regulation requires (including procedures for demonstrating compliance with the requirements of subsection (c)(3)), to have the full cost thereof continue to be withheld from the former employee's annuity or compensation, as the case may be, beginning as of when such withholdings would otherwise cease under the second sentence of paragraph (1).

"(B) An election made by an insured individual under subparagraph (A) (and withholdings pursuant thereto) shall terminate in the event that—

"(i) the insured individual—

"(I) revokes such election; or

"(II) makes any redesignation or other change in the designation under section 8705 (as in effect at the time of retirement); or

"(ii) the Office finds, upon the application of the insured individual or on its own initiative, that any of the requirements or conditions for unreduced additional optional insurance under subsection (c)(3) are, at any time, no longer met.".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall take effect on the date of the enactment of this Act.

(2) ELECTION FOR CERTAIN INDIVIDUALS NOT OTHERWISE ELIGIBLE.—The Office of Personnel Management shall prescribe regulations under which an election under section 8714b(d)(3)(A) of title 5, United States Code (as amended by this section) may be made, within 1 year after the date of the enactment of this Act, by any individual not otherwise eligible to make such an election, but only if such individual—

(A) separated from service on or after the first day of the 50-month period ending on the date of enactment of this Act; and

(B) would have been so eligible had the amendments made by this section (and implementing regulations) been in effect as of the individual's separation date (or, if earlier, the last day for making such an election based on that separation).

(3) WITHHOLDINGS.—

(A) PROSPECTIVE EFFECT.—If an individual makes an election under paragraph (2), withholdings under section 8714b(d)(3)(A) of such title 5 shall thereafter be made from such individual's annuity or compensation, as the case may be.

(B) EARLIER AMOUNTS.—If, pursuant to such election, benefits are in fact paid in accordance with section 8714b(c)(3) of such title 5 upon the death of the insured individual, an appropriate reduction (computed under regulations prescribed by the Office) shall be made in such benefits to reflect the withholdings that—

(i) were not made (before the commencement of withholdings under subparagraph (A)) by reason of the cessation of withholdings under the second sentence of section 8714b(d)(1) of such title; but

(ii) would have been made had the amendments made by this section (and implementing regulations) been in effect as of the time described in paragraph (2)(B).

(4) NOTICE.—The Office shall, by publication in the Federal Register and such other methods as it considers appropriate, notify current and former Federal employees as to the enactment of this section and any benefits for which they might be eligible pursuant thereto. Included as part of such notification shall be a brief description of the procedures for making an election under paragraph (2) and any other information that the Office considers appropriate.

SEC. 403. TEMPORARY CONTINUATION OF FEDERAL EMPLOYEES' LIFE INSURANCE.

Section 8706 of title 5, United States Code, is amended by adding at the end the following:

"(g)(1) Notwithstanding subsections (a) and (b) of this section, an employee whose coverage under this chapter would otherwise terminate due to a separation described in paragraph (3) shall be eligible to continue basic insurance coverage described in section 8704 in accordance with this subsection and regulations the Office may prescribe, if the employee arranges to pay currently into the Employees Life Insurance Fund, through the former employing agency or, if an annuitant, through the responsible retirement system, an amount equal to the sum of—

"(A) both employee and agency contributions which would be payable if separation had not occurred; plus

"(B) an amount, determined under regulations prescribed by the Office, to cover necessary administrative expenses, but not to exceed 2 percent of the total amount under subparagraph (A).

"(2) Continued coverage under this subsection may not extend beyond the date which is 18 months after the effective date of the separation which entitles a former employee to coverage under this subsection. Termination of continued coverage under this subsection shall be subject to provision for temporary extension of life insurance coverage and for conversion to an individual policy of life insurance as provided by subsection (a). If an eligible employee does not make an election for purposes of this subsection, the employee's insurance will terminate as provided by subsection (a).

"(3)(A) This subsection shall apply to an employee who, on or after the date of enactment of this subsection and before the applicable date under subparagraph (B)—

"(i) is involuntarily separated from a position due to a reduction in force, or separates voluntarily from a position the employing agency determines is a 'surplus position' as defined by section 8905(d)(4)(C); and

"(ii) is insured for basic insurance under this chapter on the date of separation.

"(B) The applicable date under this subparagraph is October 1, 1999, except that, for purposes of any involuntary separation referred to in subparagraph (A) with respect to which appropriate specific notice is afforded to the affected employee before October 1, 1999, the applicable date under this subparagraph is February 1, 2000.".

TITLE V—REORGANIZATION FLEXIBILITY

SEC. 501. VOLUNTARY REDUCTIONS IN FORCE.

Section 3502(f) of title 5, United States Code, is amended to read as follows:

"(f)(1) The head of an Executive agency or military department may—

"(A) separate from service any employee who volunteers to be separated under this subparagraph even though the employee is not otherwise subject to separation due to a reduction in force; and

"(B) for each employee voluntarily separated under subparagraph (A), retain an employee in a similar position who would otherwise be separated due to a reduction in force.

"(2) The separation of an employee under paragraph (1)(A) shall be treated as an involuntary separation due to a reduction in force, except for purposes of priority placement programs and advance notice.

"(3) An employee with critical knowledge and skills (as defined by the head of the Executive agency or military department concerned) may not participate in a voluntary separation under paragraph (1)(A) if the agency or department head concerned determines that such participation would impair the performance of the mission of the agency or department (as applicable).

"(4) The regulations prescribed under this section shall incorporate the authority provided in this subsection.

"(5) No authority under paragraph (1) may be exercised after September 30, 2001.".

SEC. 502. NONREIMBURSABLE DETAILS TO FEDERAL AGENCIES BEFORE A REDUCTION IN FORCE.

(a) IN GENERAL.—Section 3341 of title 5, United States Code, is amended to read as follows:

"§ 3341. Details; within Executive agencies and military departments; employees affected by reduction in force

"(a) The head of an Executive agency or military department may detail employees, except those required by law to be engaged exclusively in some specific work, among the bureaus and offices of the agency or department.

"(b) The head of an Executive agency or military department may detail to duties in the same or another agency or department, on a nonreimbursable basis, an employee who has been identified by the employing agency as likely to be separated from the Federal service by reduction in force or who has received a specific notice of separation by reduction in force.

"(c)(1) Details under subsection (a)—

"(A) may not be for periods exceeding 120 days; and

"(B) may be renewed (1 or more times) by written order of the head of the agency or department, in each particular case, for periods not exceeding 120 days each.

"(2) Details under subsection (b)—

"(A) may not be for periods exceeding 90 days; and

"(B) may not be renewed.

"(d) The 120-day limitation under subsection (c)(1) for details and renewals of details does not apply to the Department of Defense in the case of a detail—

"(1) made in connection with the closure or realignment of a military installation pursuant to a base closure law or an organizational restructuring of the Department as part of a reduction in the size of the armed forces or the civilian workforce of the Department; and

"(2) in which the position to which the employee is detailed is eliminated on or before the date of the closure, realignment, or restructuring.

"(e) For purposes of this section—

"(1) the term 'base closure law' means—

"(A) section 2687 of title 10;

"(B) title II of the Defense Authorization Amendments and Base Closure and Realignment Act; and

"(C) the Defense Base Closure and Realignment Act of 1990; and

"(2) the term 'military installation'—

"(A) in the case of an installation covered by section 2687 of title 10, has the meaning given such term in subsection (e)(1) of such section;

"(B) in the case of an installation covered by the Act referred to in subparagraph (B) of paragraph (1), has the meaning given such term in section 209(6) of such Act; and

"(C) in the case of an installation covered by the Act referred to in subparagraph (C) of paragraph (1), has the meaning given such term in section 2910(4) of such Act.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 33 of title 5, United States Code, is amended by striking the item relating to section 3341 and inserting the following:

"3341. Details; within Executive agencies and military departments; employees affected by reduction in force.".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect 30 days after the date of the enactment of this Act.

TITLE VI—SOFT-LANDING PROVISIONS

SEC. 601. CONTINUED ELIGIBILITY FOR LIFE INSURANCE.

(a) IN GENERAL.—Section 8706 of title 5, United States Code, is amended by redesignating subsections (d) through (f) as subsections (e) through (g), respectively, and by inserting after subsection (c) the following:

"(d)(1) Notwithstanding subsection (b), any employee who, on or after the date of the enactment of this subsection and before the applicable date under paragraph (2)—

"(A) is involuntarily separated from a position, or voluntarily separated from a surplus position, in or under an Executive agency due to a reduction in force,

"(B) based on the separation referred to in subparagraph (A), retires on an immediate annuity under subchapter III of chapter 83 or subchapter II of chapter 84, but does not satisfy the requirements of subsection (b)(1), and

"(C) is insured on the date of separation,

may, within 60 days after the date of separation, elect to continue such employee's insurance and arrange to pay currently into the Employees' Life Insurance Fund both the employee and agency contributions therefor, in accordance with procedures prescribed by the Office. If the employee does not so elect, such employee's insurance will terminate as provided by subsection (a).

"(2) The applicable date under this paragraph is October 1, 1999, except that, for purposes of any involuntary separation referred to in paragraph (1)(A) with respect to which appropriate specific notice is afforded to the affected employee before October 1, 1999, the applicable date under this paragraph is February 1, 2000.

"(3) For purposes of this subsection, the term 'surplus position', with respect to an agency, means any position determined in accordance with regulations under section 8905a(d)(4)(C) for such agency.".

(b) CONFORMING AMENDMENT.—Section 8706(g) of title 5, United States Code, as so redesignated by subsection (a), is amended by striking "subsection (e)" and inserting "subsection (f)".

SEC. 602. CONTINUED ELIGIBILITY FOR HEALTH INSURANCE.

(a) CONTINUED ELIGIBILITY AFTER RETIREMENT.—Section 8905 of title 5, United States Code, is amended—

(1) in the first sentence of subsection (b) by striking "An" and inserting "Subject to subsection (g), an"; and

(2) by adding at the end the following:

"(g)(1) The Office shall waive the requirements for continued enrollment under subsection (b) in the case of any individual who, on or after the date of the enactment of this subsection and before the applicable date under paragraph (2)—

"(A) is involuntarily separated from a position, or voluntarily separated from a surplus position, in or under an Executive agency due to a reduction in force,

"(B) based on the separation referred to in subparagraph (A), retires on an immediate annuity under subchapter III of chapter 83 or subchapter II of chapter 84, and

"(C) is enrolled in a health benefits plan under this chapter as an employee immediately before retirement.

"(2) The applicable date under this paragraph is October 1, 1999, except that, for purposes of any involuntary separation referred to in paragraph (1)(A) with respect to which appropriate specific notice is afforded to the affected employee before October 1, 1999, the applicable date under this paragraph is February 1, 2000.

"(3) For purposes of this subsection, the term 'surplus position', with respect to an agency, means any position determined in accordance with regulations under section 8905a(d)(4)(C) for such agency.".

(b) TEMPORARY CONTINUED ELIGIBILITY AFTER BEING INVOLUNTARILY SEPARATED.—Section 8905a(d)(4) of title 5, United States Code, is amended—

(1) in subparagraph (A) by striking "the Department of Defense" and inserting "an Executive agency"; and

(2) by amending subparagraph (C) to read as follows:

"(C) For purposes of this paragraph, the term 'surplus position' means a position that, as determined under regulations prescribed by the head of the agency involved, is identified during planning for a reduction in force as being no longer required and is designated for elimination during the reduction in force.".

SEC. 603. PRIORITY PLACEMENT PROGRAMS FOR FEDERAL EMPLOYEES AFFECTED BY A REDUCTION IN FORCE.

(a) IN GENERAL.—Subchapter I of chapter 33 of title 5, United States Code, is amended by adding at the end the following:

"§ 3330a. Priority placement programs for employees affected by a reduction in force

"(a) Not later than 3 months after the date of the enactment of this section, each Executive agency shall establish an agencywide priority placement program, to facilitate employment placement for employees who—

"(1) are scheduled to be separated from service due to a reduction in force under—

"(A) regulations prescribed under section 3502; or

"(B) procedures established under section 3595;

"(2) are separated from service due to such a reduction in force; or

"(3) have received a rating of at least fully successful (or the equivalent) as the last performance rating of record used for retention purposes (except for employees in positions excluded from a performance appraisal system by law, regulation, or administrative action taken by the Office of Personnel Management).

"(b)(1) Each agencywide priority placement program under this section shall include provisions under which a vacant position shall not (except as provided in this subsection) be filled by the appointment or transfer of any individual from outside of that agency (other than an individual described in paragraph (2)) if—

"(A) there is then available any individual described in paragraph (2) who is qualified for the position; and

"(B) the position—

"(i) is at the same grade or pay level (or the equivalent) or not more than 3 grades (or grade intervals) below that of the position last held by such individual before placement in the new position;

"(ii) is within the same commuting area as the individual's last-held position (as referred to in clause (i)) or residence; and

"(iii) has the same type of work schedule (whether full-time, part-time, or intermittent) as the position last held by the individual.

"(2) For purposes of an agencywide priority placement program, an individual shall be considered to be described in this paragraph if such individual is—

"(A) an employee of such agency who is scheduled to be separated, as described in subsection (a)(1); or

"(B) an individual who became a former employee of such agency as a result of a separation, as described in subsection (a)(2).

"(c)(1) If after a reduction in force the agency has no positions of any type within the local commuting areas specified in this section, the individual may designate a different local commuting area where the agency has continuing positions in order to exercise reemployment rights under this section. An agency may determine that such designations are not in the interest of the Government for the purpose of paying relocation expenses under subchapter II of chapter 57.

"(2) At its option, an agency may administratively extend reemployment rights under this section to include other local commuting areas.

"(d)(1) In selecting employees for positions under this section, the agency shall place qualified present and former employees in retention order by veterans' preference subgroup and tenure group.

"(2) An agency may not pass over a qualified present or former employee to select an individual in a lower veterans' preference subgroup within the tenure group, or in a lower tenure group.

"(3) Within a subgroup, the agency may select a qualified present or former employee without regard to the individual's total creditable service.

"(e) An individual is eligible for reemployment priority under this section for 2 years from the effective date of the reduction in force from which the individual will be, or has been, separated under section 3502.

"(f) An individual qualified present or former employee loses eligibility for reemployment priority under this section when the individual—

"(1) requests removal in writing;

"(2) accepts or declines a bona fide offer under this section or fails to accept such an offer within the period of time allowed for such acceptance, or

"(3) separates from the agency before being separated under section 3502. A present or former employee who declines a position with a representative rate (or equivalent) that is less than the rate of the position from which the individual was separated under section 3502 retains eligibility for positions with a higher representative rate up to the rate of the individual's last position.

"(g) Whenever more than one individual is qualified for a position under this section, the agency shall select the most highly qualified individual, subject to subsection (d).

"(h) The Office of Personnel Management shall issue regulations to implement this section.".

(b) CLERICAL AMENDMENT.—The table of sections for chapter 33 of title 5, United States Code, is amended by adding after the item relating to the section 3330 the following:

"3330a. Priority placement programs for employees affected by a reduction in force.".

SEC. 604. JOB PLACEMENT AND COUNSELING SERVICES.

(a) AUTHORITY FOR SERVICES.—The head of each Executive agency may establish a program to provide job placement and counseling services to current and former employees.

(b) TYPES OF SERVICES AUTHORIZED.—A program established under this section may include such services as—

(1) career and personal counseling;

(2) training in job search skills; and

(3) job placement assistance, including assistance provided through cooperative arrangements with State and local employment service offices.

(c) ELIGIBILITY FOR SERVICES.—Services authorized by this section may be provided to—

(1) current employees of the agency or, with the approval of such other agency, any other agency; and

(2) employees of the agency or, with the approval of such other agency, any other agency who have been separated for less than 1 year, if the separation was not a removal for cause on charges of misconduct or delinquency.

(d) REIMBURSEMENT FOR COSTS.—The costs of services provided to current or former employees of another agency shall be reimbursed by that agency.

SEC. 605. EDUCATION AND RETRAINING INCENTIVES.

(a) NON-FEDERAL EMPLOYMENT INCENTIVE PAYMENTS.—

(1) DEFINITIONS.—For purposes of this subsection—

(A) the term "eligible employee" means an employee who is involuntarily separated from a position, or voluntarily separated from a surplus position, in or under an Executive agency due to a reduction in force, except that such term does not include an employee who, at the time of separation, meets the age and service requirements for an immediate annuity under subchapter III of chapter 83 or chapter 84 of title 5, United States Code, other than under section 8336(d) or 8414(b) of such title;

(B) the term "non-Federal employer" means an employer other than the Government of the United States or any agency or other instrumentality thereof;

(C) the term "Executive agency" has the meaning given such term by section 105 of title 5, United States Code; and

(D) the term "surplus position" has the meaning given such term by section 8905(d)(4)(C) of title 5, United States Code.

(2) AUTHORITY.—The head of an Executive agency may pay retraining and relocation incentive payments, in accordance with this subsection, in order to facilitate the reemployment of eligible employees who are separated from such agency.

(3) RETRAINING INCENTIVE PAYMENT.—

(A) AGREEMENT.—The head of an Executive agency may enter into an agreement with a non-Federal employer under which the non-Federal employer agrees—

(i) to employ an individual referred to in paragraph (2) for at least 12 months for a salary which is mutually agreeable to the employer and such individual; and

(ii) to certify to the agency head any costs incurred by the employer for any necessary training provided to such individual in connection with the employment by such employer.

(B) PAYMENT OF RETRAINING INCENTIVE PAYMENT.—The agency head shall pay a retraining incentive payment to the non-Federal employer upon the employee's completion of 12 months of continuous employment by that employer. The agency head shall prescribe the amount of the incentive payment.

(C) PRORATION RULE.—The agency head shall pay a prorated amount of the full retraining incentive payment to the non-Federal employer for an employee who does not remain employed by the non-Federal employer for at least 12 months, but only if the employee remains so employed for at least 6 months.

(D) LIMITATION.—In no event may the amount of the retraining incentive payment paid for the training of any individual exceed the amount certified for such individual under subparagraph (A), subject to subsection (c).

(4) RELOCATION INCENTIVE PAYMENT.—The head of an agency may pay a relocation incentive payment to an eligible employee if it is necessary for the employee to relocate in order to commence employment with a non-Federal employer. Subject to subsection (e), the amount of the incentive payment shall not exceed the amount that would be payable for travel, transportation, and subsistence expenses under subchapter II of chapter 57 of title 5, United States Code, including any reimbursement authorized under section 5724b of such title, to a Federal employee who transfers between the same locations as the individual to whom the incentive payment is payable.

(5) DURATION.—No incentive payment may be paid for training or relocation commencing after June 30, 2000.

(6) SOURCE.—An incentive payment under this subsection shall be payable from appropriations or other funds available to the agency for purposes of training (within the meaning of section 4101(4) of title 5, United States Code).

(b) EDUCATIONAL ASSISTANCE.—

(1) IN GENERAL.—Under regulations prescribed by the Office of Personnel Management, all or any part of the amount described in subsection (c) may be afforded to any employee described in paragraph (2) in the form of educational assistance.

(2) ELIGIBLE EMPLOYEE.—An individual shall not be eligible for educational assistance under this subsection unless such individual—

(A) is an eligible employee, within the meaning of subsection (a); and

(B) has completed at least 3 years of current continuous service in any Executive agency or agencies.

(c) AGGREGATE LIMITATION.—No incentive payment or other amount may be paid under this section to or on behalf of any individual to the extent that such amount would cause the aggregate amount otherwise paid or payable under this section, to or on behalf of such individual, to exceed $10,000.

TITLE VII—MISCELLANEOUS

SEC. 701. REIMBURSEMENTS RELATING TO PROFESSIONAL LIABILITY INSURANCE.

(a) AUTHORITY.—Notwithstanding any other provision of law, any amounts appropriated, for fiscal year 1997 or any fiscal year thereafter, for salaries and expenses of Government employees may be used to reimburse any qualified employee for not to exceed one-half the costs incurred by such employee for professional liability insurance. A payment under this section shall be contingent upon the submission of such information or documentation as the employing agency may require.

(b) QUALIFIED EMPLOYEE.—For purposes of this section, the term "qualified employee" means—

(1) an agency employee whose position is that of a law enforcement officer;

(2) an agency employee whose position is that of a supervisor or management official; or

(3) such other employee as the head of the agency considers appropriate

(c) DEFINITIONS.—For purposes of this section—

(1) the term "agency" means an Executive agency, as defined by section 105 of title 5, United States Code;

(2) the term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, prosecution, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including any law enforcement officer under section 8331(20) or 8401(17) of such title 5;

(3) the terms "supervisor" and "management official" have the respective meanings given them by section 7103(a) of such title 5; and

(4) the term "professional liability insurance" means insurance which provides coverage for—

(A) legal liability for damages due to injuries to other persons, damage to their property, or other damage or loss to such other persons (including the expenses of litigation and settlement) resulting from or arising out of any tortious act, error, or omission of the covered individual (whether common law, statutory, or constitutional) while in the performance of such individual's official duties as a qualified employee; and

(B) the cost of legal representation for the covered individual in connection with any administrative or judicial proceeding (including any investigation or disciplinary proceeding) relating to any act, error, or omission of the covered individual while in the performance of such individual's official duties as a qualified employee, and other legal costs and fees relating to any such administrative or judicial proceeding.

SEC. 702. EMPLOYMENT RIGHTS FOLLOWING CONVERSION TO CONTRACT.

(a) IN GENERAL.—An employee whose position is abolished because an activity performed by an Executive agency (within the meaning of section 105 of title 5, United States Code, is converted to contract shall receive from the contractor an offer in good faith of a right of first refusal of employment under the contract for a position for which the employee is deemed qualified based upon previous knowledge, skills, abilities, and experience. The contractor shall not offer employment under the contract to any person prior to having complied fully with this obligation, except as provided in subsection (b), or unless no employee whose position is abolished because such activity has been converted to contract can demonstrate appropriate qualifications for the position.

(b) EXCEPTION.—Notwithstanding the contractor's obligation under subsection (a), the contractor is not required to offer a right of first refusal to any employee who, in the 12 months preceding conversion to contract, has been the subject of an adverse personnel action related to misconduct or has received a less than fully successful performance rating.

(c) LIMITATION.—No employee shall have a right to more than 1 offer under this section based on any particular separation due to the conversion of an activity to contract.

(d) REGULATIONS.—Regulations to carry out this section may be prescribed by the President.

SEC. 703. DEBARMENT OF HEALTH CARE PROVIDERS FOUND TO HAVE ENGAGED IN FRAUDULENT PRACTICES.

(a) IN GENERAL.—Section 8902a of title 5, United States Code, is amended—

(1) in subsection (a)(2)(A) by striking "subsection (b) or (c)" and inserting "subsection (b), (c), or (d)";

(2) in subsection (b)—

(A) by striking "may" and inserting "shall" in the matter before paragraph (1); and

(B) by amending paragraph (5) to read as follows:

"(5) Any provider that is currently suspended or excluded from participation under any program of the Federal Government involving procurement or nonprocurement activities.";

(3) by redesignating subsections (c) through (i) as subsections (d) through (j), respectively, and by inserting after subsection (b) the following:

"(c) The Office may bar the following providers of health care services from participating in the program under this chapter:

"(1) Any provider—

"(A) whose license to provide health care services or supplies has been revoked, suspended, restricted, or not renewed, by a State licensing authority for reasons relating to the provider's professional competence, professional performance, or financial integrity; or

"(B) that surrendered such a license while a formal disciplinary proceeding was pending before such an authority, if the proceeding concerned the provider's professional competence, professional performance, or financial integrity.

"(2) Any provider that is an entity directly or indirectly owned, or with a 5 percent or more controlling interest, by an individual who is convicted of any offense described in subsection (b), against whom a civil monetary penalty has been assessed under subsection (d), or who has been excluded from participation under this chapter.

"(3) Any provider that the Office determines, in connection with claims presented under this chapter, has charged for health care services or supplies in an amount substantially in excess of such provider's customary charges for such services or supplies (unless the Office finds there is good cause for such charge), or charged for health care services or supplies which are substantially in excess of the needs of the covered individual or which are of a quality that fails to meet professionally recognized standards for such services or supplies.

"(4) Any provider that the Office determines has committed acts described in subsection (d).";

(4) in subsection (d), as so redesignated by paragraph (3), by amending paragraph (1) to read as follows:

"(1) in connection with claims presented under this chapter, that a provider has charged for a health care service or supply which the provider knows or should have known involves—

"(A) an item or service not provided as claimed;

"(B) charges in violation of applicable charge limitations under section 8904(b); or

"(C) an item or service furnished during a period in which the provider was excluded from participation under this chapter pursuant to a determination by the Office under this section, other than as permitted under subsection (g)(2)(B);";

(5) in subsection (f), as so redesignated by paragraph (3), by inserting "(where such debarment is not mandatory)," after "under this section" the first place it appears;

(6) in subsection (g), as so redesignated by paragraph (3)—

(A) by striking "(g)(1)" and all that follows through the end of paragraph (1) and inserting the following:

"(g)(1)(A) Except as provided in subparagraph (B), debarment of a provider under subsection (b) or (c) shall be effective at such time and upon such reasonable notice to such provider, and to carriers and covered individuals, as shall be specified in regulations prescribed by the Office. Any such provider that is excluded from participation may request a hearing in accordance with subsection (h)(1).

"(B) Unless the Office determines that the health or safety of individuals receiving health care services warrants an earlier effective date, the Office shall not make a determination adverse to a provider under subsection (c)(4) or (d) until such provider has been given reasonable notice and an opportunity for the determination to be made after a hearing as provided in accordance with subsection (h)(1).";

(B) in paragraph (3)—

(i) by inserting "of debarment" after "notice"; and

(ii) by adding at the end the following: "In the case of a debarment under paragraphs (1) through (4) of subsection (b), the minimum period of exclusion shall not be less than 3 years, except as provided in paragraph (4)(B)(ii)."; and

(C) in paragraph (4)(B)(i)(I) by striking "subsection (b) or (c)" and inserting "subsection (b), (c), or (d)";

(7) in subsection (h)—

(A) by striking "(h)(1)" and all that follows through the end of paragraph (2) and inserting the following:

"(h)(1) Any provider of health care services or supplies that is the subject of an adverse determination by the Office under this section shall be entitled to reasonable notice and an opportunity to request a hearing of record, and to judicial review as provided in this subsection after the Office renders a final decision. The Office shall grant a request for a hearing upon a showing that due process rights have not previously been afforded with respect to any finding of fact which is relied upon as a cause for an adverse determination under this section. Such hearing shall be conducted without regard to subchapter II of chapter 5 and chapter 7 of this title by a hearing officer who shall be designated by the Director of the Office and who shall not otherwise have been involved in the adverse determination being appealed. A request for a hearing under this subsection must be filed within such period and in accordance with such procedures as the Office shall prescribe by regulation.

"(2) Any provider adversely affected by a final decision under paragraph (1) made after a hearing to which such provider was a party may seek review of such decision in the United States District Court for the District of Columbia or for the district in which the plaintiff resides or has his principal place of business by filing a notice of appeal in such court within 60 days from the date the decision is issued and simultaneously sending copies of such notice by certified mail to the Director of the Office and to the Attorney General. In answer to the appeal, the Director of the Office shall promptly file in such court a certified copy of the transcript of the record, if the Office conducted a hearing, and other evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and evidence of record, a judgment affirming, modifying, or setting aside, in whole or in part, the decision of the Office, with or without remanding the cause for a rehearing. The district court shall not set aside or remand the decision of the Office unless there is not substantial evidence on the record, taken as a whole, to support the findings by the Office of a cause for action under this section or unless action taken by the Office constitutes an abuse of discretion."; and

(8) in subsection (i), as so redesignated by paragraph (3)—

(A) by striking "subsection (c)" and inserting "subsection (d)"; and

(B) by adding at the end the following: "The amount of a penalty or assessment as finally determined by the Office, or other amount the Office may agree to in compromise, may be deducted from any sum then or later owing by the United States to the party against whom the penalty or assessment has been levied.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), this section shall take effect on the date of the enactment of this Act.

(2) EXCEPTIONS.—(A) Paragraphs (2) and (4) of section 8902a(c) of title 5, United States Code, as amended by subsection (a), shall apply only to the extent that the misconduct which is the basis for debarment thereunder occurs after the date of the enactment of this Act.

(B) Section 8902a(d)(1)(B) of title 5, United States Code, as amended by subsection (a), shall apply only with respect to charges which violate section 8904(b) of such title 5 for items and services furnished after the date of the enactment of this Act.

(C) Section 8902a(g)(3) of title 5, United States Code, as amended by subsection (a), shall apply only with respect to debarments based on convictions occurring after the date of the enactment of this Act.

SEC. 704. EXTENSION OF CERTAIN PROCEDURAL AND APPEAL RIGHTS TO CERTAIN PERSONNEL OF THE FEDERAL BUREAU OF INVESTIGATION.

(a) IN GENERAL.—Section 7511(b)(8) of title 5, United States Code, is amended by striking "the Federal Bureau of Investigation,".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply with respect to any personnel action taking effect after the end of the 45-day period beginning on the date of the enactment of this Act.

SEC. 705. CONVERSION OF CERTAIN EXCEPTED SERVICE POSITIONS IN THE UNITED STATES FIRE ADMINISTRATION TO COMPETITIVE SERVICE POSITIONS.

(a) IN GENERAL.—No later than the date described under subsection (d)(1), the Director of the Federal Emergency Management Agency and the Director of the Office of Personnel Management shall take such actions as necessary to convert each excepted service position established before the date of the enactment of this Act under section 7(c)(4) of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2206(c)(4)) to a competitive service position.

(b) EFFECT ON EMPLOYEES.—Any employee employed on the date of the enactment of this Act in an excepted service position converted under subsection (a)—

(1) shall remain employed in the competitive service position so converted without a break in service;

(2) by reason of such conversion, shall have no—

(A) diminution of seniority;

(B) reduction of cumulative years of service; and

(C) requirement to serve an additional probationary period applied; and

(3) shall retain their standing and participation with respect to chapter 83 or 84 of title 5, United States Code, relating to Federal retirement.

(c) PROSPECTIVE COMPETITIVE SERVICE POSITIONS.—Section 7(c)(4) of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2206(c)(4)) is amended to read as follows:

"(4) appoint faculty members to competitive service positions and with respect to temporary and intermittent services, to make appointments of consultants to the same extent as is authorized by section 3109 of title 5, United States Code;".

(d) EFFECTIVE DATE.—(1) Except as provided under paragraph (2), this section shall take effect on the first day of the first pay period, applicable to the positions described under subsection (a), beginning after the date of the enactment of this Act.

(2)(A) The Director of the Federal Emergency Management Agency and the Director of the Office of Personnel Management shall take such actions as directed under subsection (a) on and after the date of the enactment of this Act.

(B) Subsection (c) shall take effect on the date of the enactment of this Act.

SEC. 706. ELIGIBILITY FOR CERTAIN SURVIVOR ANNUITY BENEFITS.

For the purpose of determining eligibility for survivor annuity benefits for a former spouse under section 8341 of title 5, United States Code, an application of any former spouse shall be approved if—

(1) the annuitant is deceased;

(2) the former spouse was living as of January 1, 1992;

(3) the former spouse has not received Social Security benefits based on eligibility as the spouse of the annuitant;

(4) such application was filed on or after January 1, 1989;

(5) the annuitant rendered at least 25 years of creditable service to the Federal Government;

(6) at the time of the annuitant's retirement, the annuitant and the former spouse had been married at least 25 years;

(7) at the time of the annuitant's retirement, the annuitant designated the former spouse to receive survivor annuity benefits;

(8) the annuitant and the former spouse were divorced prior to September 14, 1978, and after the annuitant retired;

(9) neither at the time of the divorce nor at any time thereafter was a joint waiver of survivor annuity benefits executed between the annuitant and the former spouse;

(10) the divorce decree was silent as to survivor annuity benefits or designated the former spouse to receive survivor annuity benefits;

(11) subsequent to the divorce of the annuitant and the former spouse, the annuitant advised the Office of Personnel Management of the divorce;

(12) neither the annuitant nor the former spouse married any other individual after their divorce from each other;

(13) no direct notice outlining or defining the former spouse's survivor annuity benefits election rights was delivered to the former spouse by the Office of Personnel Management; and

(14) the former spouse has exhausted all judicial remedies up to and including remedies available through the United States Court of Appeals.

Mr. MICA. So with those opening comments, we will hear from a ranking member and other members who will join us, and I do want to go ahead and get through the proceedings. I am going to call our first panel. Panel 1 is Timothy Bowling, Associate Director, Federal Workforce Management Issues, of the General Accounting Office; Allan Heuerman, Associate Director of Human Resources Systems Service, Office of Personnel Management; Carol Okin, Associate Director of Office of Merit Systems Oversight and Effectiveness, OPM; and Roger Mehle, who is the executive director of the Federal Retirement Thrift Investment Board.

As is the custom with our investigations on the Oversight Subcommittee, if you will stand, I will swear you in.

[Witnesses sworn.]

Mr. MICA. Thank you, and welcome back, and I will get right to the subject at hand. I wanted to time this perfectly so our ranking member does not miss a morsel of your missives. I will recognize you, Mr. Bowling. And if you would like, as is customary, to submit a full, lengthy statement for the record and summarize it, I would appreciate your candid summary in 5 minutes or less.

STATEMENTS OF TIMOTHY BOWLING, ASSOCIATE DIRECTOR, FEDERAL WORKFORCE MANAGEMENT ISSUES, GENERAL ACCOUNTING OFFICE; ALLAN HEUERMAN, ASSOCIATE DIRECTOR, HUMAN RESOURCES SYSTEMS SERVICE, OFFICE OF PERSONNEL MANAGEMENT; AND ROGER W. MEHLE, EXECUTIVE DIRECTOR, FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Mr. BOWLING. Thank you, Mr. Chairman. I will do as you suggest. I am pleased to be here today to discuss the implication of the Omnibus Civil Service Reform Act of 1996 on the redress system for Federal employees.

When we testified before this subcommittee last November, we stated that the complexity of the system and the variety of redress mechanisms it affords Federal employees make it inefficient, expensive, and time-consuming. Our views remain unchanged. We feel that congressional action that would reduce this inefficiency, save money, and shorten the time involved in employee redress would be beneficial, provided these actions upheld two fundamental principles, that of fair treatment for Federal employees and of an efficiently managed Federal Government.

In my statement today, I will remark briefly on the current redress system and comment on the following three aspects of the proposed legislation that we feel could have significant implications if enacted. Eliminating the mixed-case scenario, moving toward the private sector model in handling Federal sector discrimination complaints, and promoting the use of alternative dispute resolution (ADR) to reduce the number of formal discrimination complaints.

One of the purposes of the Civil Service Reform Act of 1978 was to streamline the previous redress system. The scheme that has emerged is far from simple. Today, four independent agencies can handle employee complaints or appeals: the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of Special Counsel, and the Federal Labor Relations Authority. While these agencies' boundaries may appear to have been

neatly drawn, in practice the redress system forms a tangled scheme.

To begin with, a given case may be brought before more than one of these agencies, a circumstance that adds time-consuming steps to the redress process and may result in the agencies reviewing each other's decisions. Further, the law provides for additional review of the adjudicatory agencies' decisions, or in the case of discrimination claims, even de novo trials in the Federal courts.

Even the typical case under this system can take a long time to resolve, especially if it involves a claim of discrimination. Among discrimination cases closed during fiscal year 1994 for which there was a hearing before an EEOC administrative judge and an appeal of an agency final decision to the Commission itself, the average time, from the filing of the complaint with the employing agency to the Commission's decision on the appeal, was over 800 days.

Just how much the Government's multilevel, multiagency redress system costs is impossible to ascertain. However, we know that in fiscal year 1994, the last year for which data on all four of the redress agencies were available, the share of the budgets of the four agencies that was devoted to individual Federal employees' appeals and complaints totaled about $54 million. We also know that in fiscal year 1994, employing agencies reported spending almost $34 million investigating discrimination complaints. In addition, over $7 million was awarded for complainants' legal fees and costs in discrimination cases alone.

While this system is clearly expensive, many of its real implications cannot be measured in dollars. The redress system's protracted processes and requirements can divert Federal managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems.

It is also important to observe that under this system Federal workers have substantially greater employment protections than do private sector employees. Federal employees file workplace discrimination complaints at roughly six times the per capita rate of private sector workers. And while some 47 percent of discrimination complaints in the private sector involve the most serious adverse action—that is termination—only 18 percent of discrimination complaints among Federal workers are related to firings.

The most frequently cited example of jurisdictional overlap in the redress system is the so-called mixed-case, under which a career employee who has experienced an adverse action appealable to MSPB and who feels that the action was based on discrimination can essentially appeal to both MSPB and EEOC.

The proposed legislation would eliminate the mixed-case scenario. This would appear to make good sense, especially in light of the record regarding mixed cases. First, few mixed cases coming before MSPB result in a finding of discrimination. Second, when EEOC reviews MSPB's decisions in mixed cases, it almost always agrees with them.

Under the mixed-case scenario, an appellant can, at no additional risk to his or her case, have two agencies review the appeal rather than one. MSPB and EEOC rarely differ in their determinations, but an employee has little to lose in asking both agencies to

review the issue. Eliminating the possibility of mixed cases would eliminate both the jurisdictional overlap and the inefficiency that accompanies it.

The proposed legislation would also bring discrimination complaint processes more in line with the private sector model, which would fundamentally change EEOC's role. Today, cases involving both an adverse action appealable to MSPB and a claim of discrimination become mixed cases, as I have just described.

Under the proposed legislation, EEOC would not review MSPB decisions. Instead, it would have the authority to petition the Court of Appeals for the Federal Circuit to review MSPB decisions in which EEOC believed that MSPB had misinterpreted EEO case law. EEOC's role, then, would essentially shift from adjudicator to watchdog.

Similarly, in cases involving only a claim of discrimination, EEOC's role would also change. Today, EEOC mandates that agencies perform investigations of their employees' discrimination claims while EEOC itself adjudicates formal complaints. Under the proposed legislation, EEOC would no longer mandate agencies' discrimination complaint procedures. EEOC would investigate complaints itself and then determine if the cases had sufficient merit to prosecute before MSPB. EEOC's role, therefore, would change from adjudicator to investigator and prosecutor.

MSPB's role would also change. For the first time, it would adjudicate discrimination complaints that were not necessarily associated with adverse actions.

The redress rights of Federal employees would also change dramatically. Under the proposed legislation, the EEOC would become a gatekeeper, investigating and determining the merits of individual EEO complaints and deciding whether to argue these cases before the new adjudicator of EEO matters, MSPB.

Also under the proposed legislation, any administrative redress opportunities would be exhausted at MSPB, with recourse only to the U.S. Court of Appeals for the Federal Circuit. That would mean a review in court of the administrative process, not a de novo trial on the merits of the case itself.

One significant effect of these proposed changes might be to dampen the number of discrimination complaints reaching the formal adjudicative stage. In earlier testimony, we pointed out that one reason it takes so long to adjudicate discrimination cases is that there are so many of them. From fiscal years 1991 to 1994, for example, the number of discrimination complaints filed increased by 39 percent, the number of requests for a hearing before an EEOC administrative judge increased by about 86 percent, and the number of appeals to EEOC of agency final decisions increased by 42 percent.

Dampening the number of complaints, particularly frivolous complaints and those filed by employees who choose to abuse the system, is certainly a worthwhile goal. However, any major change in the roles of EEOC or MSPB or in other aspects of the discrimination complaint process will have broad implications and will require a careful examination.

For example, changes in the adjudicatory responsibilities of EEOC and MSPB would require major organizational changes in

both agencies. Further, the staffing requirements and skill mix of both agencies would change with their new responsibilities. In addition, there would be repercussions in the individual Federal agencies, which would likely need to develop new processes to handle discrimination complaints.

Issues such as these would need Congress' close attention if fundamental redress system reform is to be successful.

One way of avoiding formal adjudicative procedures is through the use of alternative dispute resolution. Many private sector firms have adopted ADR as a means of avoiding the time and expense of employee litigation. A number of Federal agencies have explored ADR as well and for the similar purpose of avoiding the costly and time-consuming formalities of the employee redress system.

At your request, Mr. Chairman, we have been examining the extent to which these agencies have been using ADR, and we have found that the particular approaches vary but include the use of mediation, dispute resolution boards, and ombudsmen.

Our preliminary study indicates that it is not yet widely practiced, but, by and large, there seems to be some promise in each of these approaches.

The examples we have seen are encouraging, and we are going to continue studying ADR usage in both the private and public sector workplaces to identify lessons that can be applied more widely in the Federal Government.

The strength of ADR, some agencies have told us, is in getting beyond charges and countercharges among the parties involved and getting at the underlying personal interests, many of which may have nothing to do with discrimination but are often the real cause of conflicts in the workplace.

In summary, the redress system for Federal employees is an area with great promise for change, and not just for improving efficiency, saving money, and improving the timeliness of redress. We feel that effective improvements in the redress system could also enhance the fairness and accessibility of the system to employees and make it easier for managers to manage effectively.

Of course, any sweeping change in the redress system would need to be closely examined to ensure that the legitimate rights of Federal employees were still protected. Where that balance should be struck is a matter of Congress' critical concern.

This concludes my prepared statement, Mr. Chairman. I would be pleased to take any questions that you or other members of the subcommittee may have at the appropriate time.

Mr. MICA. Thank you, Mr. Bowling, and we will withhold those questions until we finish all the panelists. I now recognize Allan Heuerman, Associate Director of Human Resources Systems for OPM.

Mr. HEUERMAN. Mr. Chairman and members of the subcommittee, we appreciate the opportunity to be here today to discuss civil service reform legislation. As you have acknowledged, Mr. Chairman, the administration has developed a proposal for civil service reform, and I am glad to see the subcommittee shares our enthusiasm for this important subject and that you have accommodated a number of the items in the administration's proposal.

I will keep my remarks brief and emphasize that we are happy to work with the subcommittee to craft legislation that will effect changes we can all champion. I would like to take a few moments to highlight some of the basic issues that we believe civil service reform legislation must address and on which I hope we can reach agreement.

First, we are glad to see that you want to relax current restrictions on demonstration projects authority under chapter 47 of title 5, United States Code. We welcome the increase from 10 to 15 projects that may be active at any one time, and, of course, consistent with our own proposal, we would be interested in having that number made even greater in order to fully accommodate agency needs for human resource management reinvention and innovations.

We believe it is important to expand agencies' capability to initiate demonstration projects to explore and test new human resource management concepts. We do, however, have a few technical concerns about the provisions relating to the demonstration projects in the July 11 discussion draft of your bill, and we would very much like to work with the subcommittee to ensure that the problems we have identified are remedied.

Even more important, OPM is strongly opposed to authorizing demonstration projects that include waivers of the retirement, insurance, and leave statutes covering Federal employees. We believe it is essential that the Federal Government remain a single employer for purposes of its leave and benefits programs. Removing a significant number of employees from these programs would have a very serious impact on the retirement and insurance trust funds and consequently on the financial stability of these programs.

Moreover, it is important to consider that changes in employee benefits, even for a period as short as 5 years, would have a permanent effect on the lives of employees participating in the demonstration project.

Finally, waivers of the leave and benefits statutes would pose significant administrative challenges, and extremely complex issues would arise relating to the conversion of benefits of employees moving in and out of alternative systems.

For all of these reasons, we believe it would be a serious mistake to permit waivers of the retirement, insurance, and leave statutes for Federal employees.

Any civil service reform legislation must, of course, enhance the performance management and appeals system so that they are more effective in dealing with poor performers and in promoting and rewarding excellence. For example, the administration's civil service reform proposal would consolidate currently separate statutory authorities for taking actions against employees based on poor performance and misconduct.

This is an important step in streamlining due process procedures and reducing litigation that arises because both agencies and employees often find the current provisions for performance-based actions under chapter 43 are too complex and confusing. And we urge that you include this provision in the committee's bill.

In addition, we would urge that the committee's bill repeal section 4505(a) of title 5, which establishes and employs eligibility for

a cash award based simply on a fully successful rating. This also was proposed in the administration's bill. This provision in current law has fostered an unfortunate sense of entitlement concerning rating-based awards, and we believe repealing this provision would curb this inappropriate sense of entitlement and reinforce the principle that awards are intended to recognize superior rather than merely adequate performance.

We are pleased that the July 11 draft of your bill, Mr. Chairman, promotes the use of alternative dispute resolution techniques at the agency level. We believe that effective ADR is probably the most important single strategy in dealing with the complexity of disputes and appeals. The draft bill includes some far-reaching proposals, which Mr. Bowling has outlined, for streamlining appeals procedures, and we believe that these require a thorough assessment and vetting with the stakeholders.

OPM also presented additional proposals for reform of the dispute resolution process in our April 23 testimony before the Subcommittee on Treasury, Postal Service, and General Government of the House Appropriations Committee. We recently shared with this subcommittee's staff legislative language implementing these recommendations, and we hope that you will consider including these in the final version of your bill.

We have serious concerns about section 301 of your July 11 discussion draft, which would prescribe statutory service credits based on performance for establishing the order of retention in a reduction in force. The increased service credit weight is achieved by adding together rather than averaging additional years assigned to the various performance ratings.

We are very concerned that enacting specific service credits into permanent law would seriously diminish current flexibilities of the Governmentwide performance management system, thereby restricting OPM's agencies' ability to make changes to restore the credibility of performance management.

We would, however, seriously consider incorporating into our regulations your approach to giving added weight to performance in retention credit if this could continue to be addressed in regulation rather than statute.

In addition, we are concerned about inequities that would arise in RIF's when employees in a competitive area have been under different performance management systems and thus have been subject to different methods of crediting performance toward retention standing. And this situation could easily occur as a result of movement of employees between and within agencies.

Also, we urge the subcommittee to drop the requirement under the heading of "Performance Management," to collect and publish an annual report concerning agency training plans, programs, and methods. Since 1980, Congress has been reducing the training report requirement, and in 1995 totally abolished this requirement in the Reports Elimination and Sunset Act.

We believe that again requiring a massive report on Governmentwide training will not address your concerns. As an alternative, we would be pleased to work with the subcommittee on various targeted oversight and reporting activities that would deal with specific issues that you have.

We also have concerns regarding the provisions in your discussion draft regarding voluntary reductions in force. However, I want to emphasize we endorse the objective of these provisions and look forward to working with the subcommittee to remedy these technical problems. Here, as in many of the bill's other provisions, we recommend that OPM be given regulatory authority rather than leaving each agency with no guidance in implementing these programs.

Finally, we would hope that the subcommittee would consider including other portions of the administration's proposal for civil service reform. For instance, our proposal would permit agencies to establish alternative systems for evaluating job applicants, provided they are consistent with merit system principles and veterans preference. These alternative systems could include category ranking systems in which agencies would divide applicants into quality groupings based upon an evaluation of their knowledge, skills, and abilities. This kind of system has been tested extensively and successfully in the Department of Agriculture.

We would also request that you include language proposed by the administration to clarify OPM's roles and responsibilities.

These are some of the issues we would like to see the subcommittee consider in developing civil service reform legislation. We look forward to working with you on this in the days ahead to perfect a bill we can all support; and, of course, we would be happy to answer any questions that you may have.

Mr. MICA. Thank you, Mr. Heuerman. Carol Okin, you are with OPM. Since Mr. Heuerman has already used up his quota of criticisms, we are not going to give you an opportunity.

Ms. OKIN. He spoke very eloquently for all of us at OPM.

Mr. MICA. I know you are here to provide additional resource and do not have an opening statement. We will turn to Roger Mehle now—and Roger is the executive director of the Federal Retirement Thrift Investment Board—for your comments. Welcome. You are recognized.

Mr. MEHLE. Thank you, Mr. Chairman. Good afternoon to you and to the other members of the subcommittee. As you said, I am the executive director of the Federal Retirement Thrift Investment Board, and, as such, I am the managing fiduciary of the Thrift Savings Plan for Federal employees, which is commonly referred to as the TSP.

On behalf of myself and the other statutory fiduciaries who serve as members of the Board, I appreciate the opportunity to comment on the TSP provisions in the Omnibus Civil Service Reform Act of 1996 being considered by the subcommittee today.

This legislation would make important improvements to the TSP provisions of the Federal Employees Retirement System Act, or FERSA, as it is known in shorthand. Last week, the subcommittee staff conducted a briefing to discuss the legislation's specific provisions. At that time, a discussion draft was circulated, and we were advised that further changes to it would be made. So my comments today are based both on the discussion draft and the statements of the staff regarding planned modifications of the TSP provision.

I believe all of the proposed changes would be well received by participants, and I would like to discuss each of the five of them

in turn briefly. First, a discussion of proposed additional investment funds.

FERSA authorized three TSP investment funds: The Government Securities Investment Fund, or G Fund; the Common Stock Index Investment Fund, C Fund; and the Fixed Income Investment Fund, or F Fund. The conference report that accompanied FERSA stated:

> The conferees chose to limit the number of funds to three for several reasons. Because this is a new undertaking in the Federal Government, a smaller number of funds will be more manageable. The three funds selected offer employees distinct and reasonable alternatives for investment. Should additional investment vehicles become desirable, the Congress can authorize them.

And I know that is part of the reason that we are here today.

FERSA also requires that the Board, "develop investment policies which provide for prudent investments suitable for accumulating funds for payment of retirement income."

In 1992, the Board began a long-term review and analysis of the TSP investment choices which led to the conclusion that the addition of a Small Capitalization Index Fund and an International Stock Index Fund would be appropriate. Accordingly, on May 25, 1995, the Board submitted draft legislation to the Congress that would authorize these two funds. Congresswoman Morella introduced the legislation as H.R. 2306 in the House of Representatives on September 12, 1995.

We appreciate Mrs. Morella's sponsorship and your effort, Mr. Chairman, to consider the new funds legislation today.

The Board considers these two options to be the best candidates for addition to the TSP for several reasons. They complement the G, C, and F Funds, which currently provide participants with well-diversified investments that broadly represent the U.S. equity and fixed-income markets. The S&P 500 index currently used in the C Fund represents approximately 64 percent of the market capitalization of the U.S. stock market, but it does not include many of the medium- and small-capitalization stocks constituting the remainder of the domestic markets.

The addition of a small-capitalization equity fund to the TSP investment mix would allow participants to invest in the entire U.S. stock market through the C Fund and such a new fund.

The largest asset class not included in the current TSP investment mix is foreign equities. Foreign equities represent 62 percent of the capitalization of the world's stock markets and thus offer participants an important diversification opportunity. The stocks held in the intended international index are primarily large-capitalization stocks representing a wide variety of industries in their respective markets.

The Small Capitalization Stock Index Fund and the International Stock Index Fund would be passive funds, consistent with the existing policy regarding the C and F Funds. This approach, which was examined at length by the Congress in its deliberations leading to the enactment of FERSA, has served participants well.

Now, I would like to address the proposed increase in percentage or elimination in proposed percentage limitations on contributions. Under current law, employee TSP contributions are limited to a percentage of basic pay. CSRS employees may contribute up to 5

percent of their pay. FERS employees are limited to no more than 10 percent.

The proposal would allow all employees to contribute up to the annual elective deferral limit as determined by the Internal Revenue Service, which is $9,500 in 1996. The current 10-percent limit was based on judgments by the Congress and the administration concerning the expected contribution of other FERS retirement system components and appropriate replacement rates. Since the Board has responsibility for only the TSP component of the FERS retirement package, we lack the broad jurisdiction necessary to assess fully or make recommendations regarding the appropriate contribution level. However, eliminating the percentage limitation on contributions would not present a significant administrative obstacle for the TSP or employing agencies, and we would be pleased to implement any such change.

As to the provision regarding TSP loans, under current law, the Board may approve TSP loans for only four purposes: The purchase of a primary residence, education expenses, medical expenses, or financial hardship. Significantly, the loan programs of similar private sector 401(k) plans do not impose these purpose restrictions on their employees.

While the limited TSP purpose loans have provided a degree of liquidity for employees, they place substantial administrative costs and bureaucratic burdens on loan applicants and on the plan itself because of the inescapable requirement under current law that participants thoroughly document their loan purposes. Further, the current purposes do not include all those that some, and perhaps many, would consider worthwhile.

During the briefing by the subcommittee staff that I referred to, it was indicated that the subcommittee intended to modify the proposed TSP loan provision in the draft to conform it with the approach taken in its Senate counterpart legislation, S. 1080.

We urge the subcommittee to take this broader approach. It would expand the TSP loan program in a fashion that can be efficiently administered by the Board, it would preserve the primary retirement savings purpose of the plan, would comport with the practices of similar, private-sector 401(k) plans, and would automatically satisfy any would-be future requests for more purposes.

The subcommittee's proposal would also explicitly require that loans be available in the event that furloughed employees are, indeed, not paid during a lapse in appropriations. If it became necessary, it would be my intention to ensure the continued availability of loans in such a situation under our current regulatory authority. A statutory mandate, however, would provide assurance to participants on this point.

Another feature about the proposed legislation is the immediate participation in the TSP. The plan is a voluntary program, and currently employees can elect to contribute only during two semi-annual periods established by law. The effect of this and other statutory limitations is that certain waiting periods apply before an individual may make employee contributions or receive agency automatic and matching contributions.

The proposal, which is also contained in the administration's proposed Retirement Savings and Security Act, would eliminate all

waiting periods for employee contributions to the plan for new hires and rehires. Employees who are hired or rehired would be eligible to contribute to their own funds immediately. Agency automatic and matching contributions would remain subject to the waiting periods in current law, however.

Allowing employees to begin contributing to the TSP immediately makes it more likely that they will get into or continue the habit of saving for retirement through payroll deduction. Early saving is especially important in order to maximize the effect of compound earnings and to take full advantage of the benefit of pretax savings accorded to the TSP and other similar private sector 401(k) plans under the Internal Revenue Code.

Although the proposal will create some additional complexity for agency TSP contribution activities, the agencies' track record in this program has been outstanding. We are confident that they will be able to do an effective job in making this new benefit available, and we will issue guidance and instruction as necessary to implement the change.

A final provision of the plan is proposed transfer of existing retirement savings balances to the TSP. During the briefing last week, the subcommittee staff voiced agreement on a plan to allow the TSP to accept transfers of existing retirement savings. These transfers would occur under the same conditions that apply to private sector 401(k) plans.

Recent changes in tax law and regulation issued by the IRS have clarified the rules regarding transfers. However, such transfers are not currently allowed for the TSP. There is no reason why participants should not be allowed to transfer to the TSP funds accumulated in the qualified retirement plan of a previous employer.

Participants would benefit because their portable retirement savings would follow them as they change jobs, and the special tax status accorded to such savings would be preserved. I expect this additional benefit would be welcomed by participants, and we would be pleased to make it available.

Mr. Chairman, that concludes my oral statement, and I will be pleased to answer any questions the subcommittee may have.

Mr. MICA. Thank you, and I will now recognize the ranking member of our subcommittee for an opening statement, questions, or any of the above.

Mr. MORAN. Thank you, John. I do not really need to make a statement because there are a lot of witnesses, a lot of issues that we need to cover, and so there is no need to delay it unnecessarily.

I am pretty excited about the prospect of the alternative dispute resolution resolving a lot of these appeals. It just seems to make such common sense, particularly if the person filing the complaint has to face the person they are accusing and vice-versa, and you bring in somebody that knows what they are doing, particularly someone trained by someone from the Federal Conciliation Mediation Service. We can save a lot of money. But, more importantly, we can get people back on the job; we can resolve a lot of disagreements; and it is a reform that just makes a lot of sense.

Streamlining the appeals process in the way that we suggested with mixed cases I think falls into that category, too, of just making a lot of common sense. I think we have some problems with

EEOC having its role substantially reduced as it would be under the initial draft, but we can work on that. Again, this is prior to markup. We want to get people's ideas. The outline that people have been shown is just a working draft that is subject to some change. That particular question is more appropriate for OPM.

I guess I would like to ask Mr. Bowling, though, why we have not gone to the alternative dispute resolution when it has been available. There really has not been anything preventing us. Why wasn't it more encouraged?

Mr. BOWLING. Well, I think history suggests that change comes very slowly in the Federal Government, a large organization.

Mr. MICA. Could we have those words framed?

Mr. MORAN. No. I think we know. But it can be said again that that is obviously clear.

Mr. BOWLING. In the instances where it has been tried, it seems to have been fairly effective and to some extent embraced. Usually there are isolated parts within an agency, such as the situation that I detail in my statement about the Walter Reed Medical Center, but it seems to have worked there; and I think these are the types of examples that once you build up a certain number of them, they will gather momentum, and you will see a much wider movement across Government.

So I would say perhaps in the earlier stages there was not the attention devoted to it, there was not the focus on it, and perhaps through the legislation that you are suggesting here we might be able to encourage that to a greater extent.

Mr. MORAN. Well, we want to do more than encourage it; actually, we would require that the people certify that they have gone through an alternative dispute resolution process, so that should filter out a high percentage, as has been suggested, of these cases. And you like that idea.

Mr. BOWLING. Yes; we think the alternative dispute resolution has lots of promise and lots of merit. It is still not clear what the best way to approach it is. There are different tools and different techniques for ADR, and we are not sure which are the best. We are hoping to be able to provide the subcommittee some more information on that subject as we conclude our study.

Mr. MORAN. OK. I think I can let these witnesses go, except for your questions, Mr. Chairman. I think they gave us the information that we needed. There ought not be any controversy over the TSP changes. I suspect that Connie is going to want to address some of those, since she has taken so much initiative in that area; but they were good statements and confirmed what we had expected. Thank you, Mr. Chairman.

Mr. MICA. I thank the gentleman from Virginia and recognize Mrs. Morella now for 5 minutes an opening statement or questions.

Mrs. MORELLA. Thank you, Mr. Chairman. I very much appreciate your holding this hearing today and your willingness to expand and modify this legislation at the suggestion of other Members. Several provisions included are the direct result, as has been mentioned, of legislation that I have introduced. And although this legislation is on a very fast track, I appreciate your willingness to receive input from other Members and Members in the minority,

OPM, employee representatives, in order to reach a consensus; and that is what this hearing is about.

At a time in the congressional session when the momentum for so many pieces of legislation is waning, it is clear that this is not the case with civil service reform. The omnibus bill before us is a good piece of legislation, but I admit it is also a work in progress. I look forward to hearing from the second panel, and I have enjoyed what I have heard and read from the first panel.

The hearing is part of the consensus building process necessary to enact legislation to improve our civil service system. The bill contains several important titles to improve demonstration projects, enhance performance management, bolster the Thrift Savings Plan, provide for soft landings, increase worker retraining, and provide for reorganization flexibility. And as was mentioned, the legislation that I introduced to enhance the Thrift Savings Plan has been incorporated into this omnibus bill. I am very pleased with that.

This component of the bill would empower Federal workers to take a more active and personal responsibility for their retirement and potentially increase their savings, and I appreciate the statement that was made about that. It would give Federal workers two new investment options under the Thrift Savings Plan—a small capitalization stock index investment fund, an international stock index fund.

These funds are for long-term investment strategy comparable to private pension plans, and adding two new options to Federal employees' retirement investment portfolios could increase their investment earnings for retirement.

The most important component of the bill would allow employees to invest more of their own money in the TSP without changing the Government contribution. Currently, FERS employees can put in up to 10 percent of their salary with a Government match of up to 5 percent, and CSRS employees can invest up to 5 percent of their salary.

This omnibus legislation also includes a soft-landings package to ease the pain of downsizing for Federal employees. I have repeatedly stated that the Congress has the responsibility to help Federal employees as the Government shrinks by 272,900 FTE's by offering retraining and retirement incentives. This legislation makes important advances in both of these areas.

It would permit nonreimbursable details to Federal agencies before a RIF, a concept contained in legislation I introduced, the Retraining and Outplacement Opportunity Act. It would also allow retraining and relocation expenses for private sector jobs, a concept I introduced in H.R. 2825, the Strategic Reemployment Training Act.

It would also create educational accounts so that employees separated from the Government could return to school to learn new skills.

It would allow employees to continue FEGLI coverage at full cost in the event of a RIF and extend health insurance for displaced Federal employees by waiving the 5-year minimum and extending an agency's payment for 18 months.

So, clearly, there are many other valuable provisions contained in the legislation before us today, but I do think that this is quite an undertaking, and I think the objective of making a major stride in assisting Federal employees during this very challenging time has been realized in this bill.

I look forward to hearing from the other panels. I know that my time is going to be reaching an end soon, but I do have a few questions. But I did want to make the comments in the opening statement about the fact that I think this is a work in progress.

I guess, Mr. Heuerman, for OPM, I know that you support the bill's language that eliminates the right to appeal the denial of a within grade pay increase to the MSPB. I wondered if you might elaborate on why you think this is important.

Mr. HEUERMAN. Yes; I would like to do that. This was part of the administration's own proposed civil service reform bill and stemming out of the NPR recommendations, and we believe that this is an area where the system could be simplified and would also enhance the culture for dealing with poor performance by removing this appeal right, which we think is not appropriate for the action that has been taken.

That is, in the case of a denial of within grade, unlike an adverse action where something has been taken from an employee, this is simply a case where something is denied, hopefully, for a temporary period in terms of a pay increase, because of performance matters. And we think an appropriate level of redress for this type of action for nonbargaining unit employees is the administrative review procedure which is already statutorily provided for.

And this provision, as both in the subcommittee's bill and OPM's proposal, would not take away the ability of bargaining unit employees from using the negotiated grievance procedure for seeking redress for the denial of a within grade.

Mrs. MORELLA. I wonder whether you might also make any comments about the success of alternative dispute resolution techniques that you are aware of in the agency level. Have there been some successes thus far?

Mr. HEUERMAN. Yes; we have found some successes. Over the last few years in particular, we have encouraged agencies to engage in ADR, and we have found that techniques such as factfinding and mediation and peer review and alternative discipline have all been effective. It is not, as Mr. Moran pointed out and Mr. Bowling, it is not as widespread as we would like, but we at OPM continue to encourage it. We have a clearinghouse on best practices in this area. We feature ADR in various conferences that we hold for employee and labor relations specialists. I think the National Partnership Council has expressed an interest in this area.

So we agree that it has great promise, and there are numerous good examples. Again, as has already been pointed out, it is a matter of encouraging and stimulating agencies and employee representatives and the like to really go after it.

We have also, I should note that in terms of those kinds of grievances that are handled by administrative grievance systems as contrasted to negotiated grievance systems or the EEO complaint process, OPM, within the past year, abolished its regulations in that area, leaving agencies free to create their own systems with respect

to those kinds of grievances that are handled administratively. And we did that in the spirit of encouraging agency flexibility and agency use of ADR.

Mrs. MORELLA. Let me ask you about the demonstration projects that include waivers of the retirement insurance and leave statutes covering Federal employees. You oppose authorizing them, and so I guess I would ask you, without these waivers, do you think that demonstration projects could still accurately assess agency initiatives?

Mr. HEUERMAN. With your permission, Mrs. Morella, I will defer to Ms. Okin on that question.

Mrs. MORELLA. OK. I wanted to give you a chance to speak, too, Ms. Okin. You know that.

Ms. OKIN. Mrs. Morella, we are very pleased with lots of the flexibilities that have been included in this draft proposal, but we do have serious, serious concerns about the waivers for leave and benefits and feel very strongly that that should not be part of this initiative. Basically, we right now have a very active work load with our demonstration project proposals, even without these provisions even being on the table at all.

There is a lot that the agencies can do within current law to test new and different things. By definition, the demonstration project authority is experimental. The systems that are suggested here for inclusion as far as waivers are really large, major systems that affect the entire Federal work force. The long-term stability of these systems is really, we believe, too important for changes to be made absent a legislative process or legislative scrutiny. That is in a systemwide sense.

In the more narrow-focused sense of a demonstration project itself, they are for 5-year periods of time with some allowance for extensions, and we feel very strongly that employees, when they make a commitment to employment in the Federal work force, they make a commitment with an understanding about specifically their benefits, what is going to happen long term with their retirement benefits, health insurance benefits, et cetera; and to take them out of those systems that they had made maybe long-term decisions on for a period of time could have a long-term, permanent, negative effect on their retirement outcome, the benefits package that they expected and planned for.

And we really feel that with all of the other provisions that are allowed for waivers, we have a whole phalanx of things that we can test with the agencies under this experimental mode.

Mrs. MORELLA. Very interesting. Thank you. Mr. Mehle, thank you for the comments that you made in your testimony. I wonder what would happen to Federal employees who are suddenly RIF'd who have loans that have not been totally repaid. Would they have to repay them in a lump sum?

Mr. MEHLE. No, no; anybody who is separated for whatever reason that has an outstanding loan has the option either to repay the loan or to keep the proceeds and have the distribution count as a taxable distribution. That is on the assumption that the individual who chooses not to repay a loan is less than the age that one has to be at, generally 59½, in order not to incur a penalty; and you

pay the taxes anyway, but you do not incur the penalty if you are above 59½. So you do not have to repay it, the answer.

Mrs. MORELLA. Very good. Did you want to add anything, Mr. Bowling?

Mr. BOWLING. No; thank you.

Mrs. MORELLA. Thank you. Thank you, Mr. Chairman.

Mr. MICA. I think Mr. Moran had one additional question.

Mr. MORAN. Well, Mr. Chairman, I think this issue and the subpart G in the demonstration project authority that refers to retirement benefits particularly, that is one that we ought to take out of this legislation.

I agree with Ms. Okin, and I think this is a controversial issue. To be honest with you, I did not realize before it was put in that it was going to be put in, but I do not think that we can mess with having a different retirement system and different leave benefits. You did not mention the leave benefits, I do not think, but it changes the leave benefits as well. That may be more discretion than we need provide within these demo projects.

I would assume that of any demonstration projects that occurred to date, you have not suggested any kind of latitude on these benefits, have you?

Ms. OKIN. No; and we have been very successful to have very successful demonstration projects testing very innovative things in the human resource arena.

Mr. MORAN. Yes; I think that it is enough to expand the demonstration projects. How many demonstration projects do you have now?

Ms. OKIN. Right now, we have one active, Mr. Moran. We have several in the pipeline, so very soon we will have five to six active.

Mr. MORAN. So if this was to go through, you could move up to the plate with probably half a dozen of them right away.

Ms. OKIN. Yes; well, we can do that under current legislation. We have the opportunity for 10 demonstration projects under current legislation. This proposal takes it to 15, with 5 of those being 5,000 or more, which we do not have under current provisions, and we would certainly welcome even an increase in that number. Although we have never reached that cap, bumped that cap, we certainly have a lot of interest these days in testing innovative things through the demonstration project authority.

Mrs. MORELLA. Well, I am going to, obviously, speak with the chairman about it. My own feeling at this point, though, is that subpart G on the retirement and leave benefits goes too far. We have got enough that we can look at in terms of demo projects without making that one of the considerations. But I thank you, Mr. Chairman, and thank the witnesses.

Mr. MICA. Thank you. And as I said, I am here to listen today, so I will excuse the panelists and welcome our second panel. I will read off the participants while we are changing witnesses.

The second panel is Bruce Moyer, who is the executive director of the Federal Managers Association; we have Lynn Olsen, executive director of the Professional Managers Association; and Ron P. Sanders, director of the Maxwell Center for Public Management. Welcome to our three new witnesses. As is customary, this is an

investigations and oversight subcommittee. If you would stand, and I will swear you in.

[Witnesses sworn.]

Mr. MICA. Thank you. And we will start right off by recognizing the executive director of the Federal Managers Association. Welcome back, Bruce Moyer. I look forward to your comments. As I said to the first panel, you may submit a lengthy written statement for the record, and if you would like, you can summarize in 5 minutes. Thank you.

STATEMENTS OF BRUCE L. MOYER, EXECUTIVE DIRECTOR, FEDERAL MANAGERS ASSOCIATION; LYNN OLSEN, EXECUTIVE DIRECTOR, PROFESSIONAL MANAGERS ASSOCIATION; AND RONALD P. SANDERS, DIRECTOR, MAXWELL CENTER FOR PUBLIC MANAGEMENT

Mr. MOYER. Thank you, Mr. Chairman. I will be happy to do that. Mr. Chairman and Mr. Moran, thank you very much for holding this important hearing this afternoon and for inviting FMA once again to present our views to the subcommittee on the Omnibus Civil Service Reform Act of 1996.

We applaud the subcommittee's efforts to produce meaningful and much needed reform legislation, particularly in several areas. Those go to the improvement of investment options in the Thrift Savings Plan, the provision to agencies of important tools to assist in reorganization, the provision of soft landings for employees hard hit by agency downsizing, and, finally, the authorization to agencies to pay for half the cost of professional liability insurance.

Mrs. Morella and Senator Stevens are to be commended for their efforts to improve and expand employment investment opportunities. FMA has long advocated increasing the current 5 percent cap on TSP investment for civil service retirement system employees. We are glad to see that Mrs. Morella's provision to increase the investment ceiling for all TSP participants to the IRS limit of $9,500 is included in this legislation.

FMA is also grateful that many provisions from the Federal Employee Separation Incentive and Reemployment Assistance Act, introduced by Representatives Wolf, Moran, Davis, Morella, Hoyer, and Wynn, are also included in the draft bill.

These provisions would extend to nondefense agencies many of the tools currently available to the Defense Department, such as providing up to $10,000 to non-Federal employers to retrain displaced Federal workers, to extend the agency payment for continued health care coverage to 18 months, and statutorily require agency priority placement programs. FMA has been a long-time advocate for all these soft landing proposals, and they certainly lend to the credit of this legislation.

FMA is also pleased that the legislation addresses the important issue of the legal liabilities that Federal managers and supervisors face when on the job. FMA supported Congressman Wolf's effort to include a provision in the 1997 Treasury appropriations bill to permit agencies to pay for one-half the cost of legal liability insurance for their employees. This important reform would assist Federal managers and supervisors who may encounter improper accusation

of misconduct in connection with the performance of their professional responsibilities.

I would like to now comment upon several areas, Mr. Chairman, around which we do have concerns. The first of these concerns is the area of demonstration projects. We, too, are concerned about two particular aspects of the legislation dealing with numerical limits on participants in demonstration projects and the provisions of title 5, which agencies may waive when undertaking a demonstration project.

The legislation would increase the number of authorized demo projects to 5 with more than 5,000 employees and 10 with fewer than 5,000. It also would allow agencies to waive all governmentwide rules concerning annual and sick leave while retaining only the requirement to adhere to rules covering family and medical leave for demonstration project participants.

In addition, the legislation will allow agencies to waive governmentwide rules regarding affirmative action and employee appeal rights while retaining only the rules prohibiting discrimination in hiring for demo project participants. These are in addition to the other limitations that were previously mentioned with respect to retirement coverage.

As to numerical limits, we believe that the maintenance of numerical limits on demonstration projects is not in the best interests of an effective work force. In a letter that we sent earlier this spring to the subcommittee, we raised concerns about the proposed elimination of numerical limits on demo projects that were contained in the administration's draft measure. While we favor loosening the current restrictions, we are opposed to abandoning all controls.

The legislation's numerical limits on participants in demo projects are steps in the right direction; however, under these provisions, whole departments and agencies could opt out of the civil service of a magnitude that we believe would create instability.

This would place too many Federal employees in the precarious position of being test subjects for untried personnel practices that could put their careers, their advancement prospects, their livelihoods, and the agencies' overall effectiveness at risk. This would also exceed the capacity of Congress and OPM to effectively oversee these projects to ensure that agencies are adhering to merit system principles.

Congress should loosen the reigns on demo projects but should not let them go entirely. Therefore, we recommend that the legislation be revised to state that no more than 10 percent of the Federal work force be allowed to participate in demonstration projects at any time. Authorizing a 10-percent cap would represent a reasonable step toward increasing agency flexibility by roughly doubling the current ceiling. It would also provide for the increased opportunity to study new personnel management practices while retaining the integrity of the civil service system.

We are also concerned about the ability of agencies under the legislation to waive Governmentwide rules on annual and sick leave for demonstration project participants and are concerned about the ability of agencies to waive Governmentwide rules on affirmative action and employee appeal rights for demonstration

project participants. Piecemeal efforts to address the highly sensitive issue of affirmative action should not be included in the legislation.

FMA also objects to allowing agencies to waive appeal rights for demonstration project participants. We object to allowing agencies to waive the basic right of due process. The ability of Federal employees to appeal prohibitive personnel practices and adverse actions is a basic right that must not be abridged in the name of testing new personnel practices or in the authorization of more agency flexibility.

With regard to the streamlining of the appeals process, we have shared with you, Mr. Chairman, a longstanding desire to streamline the cumbersome and confusing procedures for handling mixed cases. Those are ones, of course, that involve both a personnel action appealable to the MSPB and an allegation of discrimination. As we know, under the current procedure, a mixed case can be heard by the MSPB, the EEOC, and the special panel. In addition, the employee retains the right to begin adjudication all over again in a U.S. district court after all of these administrative bodies have heard and ruled on the case.

Title II of the legislation proposes to give employees the option of filing a complaint with the EEOC or filing an appeal with the MSPB in accordance with section 7701. We believe this dual-option approach will create a confusing and cumbersome appeal framework. Moreover, it will result in the creation of two potentially disparate bodies of law by EEOC and MSPB, with potentially dissimilar rulings on appeal by the district courts and the Federal circuit.

That is why we recommend instead the consolidation of all mixed cases through appeal only to the Merit Systems Protection Board with judicial review by the Federal circuit. This will provide greater clarity of appeal rights to appellants, preserve administrative and adjudicative resources, yield more uniform law, and render speedier justice.

In the area of performance management, we are concerned about sections in title III of the legislation that would increase the weight of performance ratings in reductions in force and repeal the right of employees to appeal within grade increases to the MSPB. We have long supported delinkage of performance ratings from RIF procedures.

Performance ratings should be used as a management tool to provide meaningful feedback to employees to foster improved performance. As well, sufficient procedures are now in effect to allow for the removal of employees for performance reasons. Tying performance ratings to RIF's encourages abuse of the system. Our members have repeatedly told us that. Performance appraisers at downsizing agencies today are at times improperly motivated to use performance ratings to protect favorite employees from RIF's. These favorites are not necessarily the ones who are the highest performers.

FMA believes that this even stronger linkage of retention credit to performance is a step in the wrong direction and recommends that section 301 be dropped from the legislation and that performance ratings be statutorily delinked from RIF's.

Improving performance management must be a central aspect of any civil service reform effort. FMA supports the elimination of the statutory requirement for performance improvement plans. PIP's are a burdensome requirement that frequently tie the hands of managers and supervisors when trying to effectively deal with poor performers.

The current performance management system gives ample opportunity outside the PIP process for employee improvement. Eliminating the statutory requirement for PIP's would represent a step forward in improving performance management in the civil service.

Finally, with regard to the matter of the appealability of the denial of within grade increases, we are concerned very much, Mr. Chairman, about the proposal containing the legislation to eliminate an employee's right to appeal the denial of within grade increases to the MSPB.

Bargaining unit employees have a number of options available to them for appealing the denial of a within grade increase. Nonbargaining unit employees, however, are much more limited in the avenues they may pursue to appeal denial of a within grade increase.

The right to appeal to MSPB should be retained for those who are not in the bargaining unit. FMA recommends that that applicable section in the legislation, therefore, be dropped from it.

We want to thank you again, Mr. Chairman and Mr. Moran, for the opportunity to appear before you this afternoon and look forward to continuing to work with you on this important legislation. Thank you.

Mr. MICA. Thank you, Mr. Moyer. And now I will recognize Lynn Olsen, executive director of the Professional Managers Association.

Ms. OLSEN. Thank you, Mr. Chairman and members of the subcommittee, for giving us the opportunity to comment on the proposed Omnibus Civil Service Reform Act of 1996.

My name is Lynn Olsen and I am the executive director of the Professional Managers Association. I have been a Federal employee for over 25 years, serving in three Federal agencies and including 17 years of experience as a manager. The Professional Managers Association represents the interests of career managers and management officials in the Federal Government.

I am here today, Mr. Chairman, to discuss four points the committee should keep in mind while working to reform the civil service system.

First, Mr. Chairman, the Congress should provide downsizing Federal agencies with all the management tools necessary to help affected employees. As Federal agencies continue to downsize, many managers are being forced to transition to new careers both inside and outside of the Federal Government. This change can be extremely frustrating and demoralizing for managers who are moving from one career to another for the first time in many years or in their lifetime.

During the next several years, Federal agencies will be forced to use reduction in force procedures to comply with stringent ceiling and funding levels. Thus, the time to mandate comprehensive agency placement programs and job placement counseling services

for all employees, including senior level employees and managers, is now.

We applaud the administration and the Office of Personnel Management for directing agencies to provide more assistance to employees affected by downsizing. We believe that agencies should be accountable for their program's success in placing employees in comparable positions both inside and outside of Government.

Agencies should be required to track and publicize the outcomes of their placement and transition programs. The worst morale destroyer for any organization is to see current employees treated as surplus while the hiring process continues unabated elsewhere.

We support the overall concepts in the sections which allow agencies more flexibility to reorganize and offer employees softer landings.

Second, Mr. Chairman, improvements in the current civil service system, particularly the various aspects of performance management systems, are absolutely critical. While we believe that recent performance history should be a major factor in the reduction of force process, we feel that the sum of 3 years of outstanding performance is not equivalent to 30 years of dedicated service to the Federal Government.

Current performance management systems remain highly subjective and judgmental and are not based upon specific objective and measurable performance criteria. Until such a system is devised and in place for a sufficient amount of time, no increase in weight should be given to the performance aspect of the retention process.

The current formula for reductions in force provides a better balance between Government experience and recent performance. Until performance appraisal systems are overhauled to reflect agreed-upon outcome measures, the current retention procedures should remain.

Third, Mr. Chairman, effective oversight and accountability mechanisms are needed to ensure Federal agencies follow established civil service principles and goals. While we agree that a limited number of demonstration. projects should be permitted to experiment with alternative personnel systems, we are extremely concerned that demonstration projects will be used to circumvent established civil service principles such as equity and merit.

In addition, any agency seeking permission to conduct a demonstration project should be required to solicit comments from the public and interested parties.

Fourth, Mr. Chairman, managers should be empowered to achieve results and to lead in a rapidly changing environment. In today's environment, the ability of managers to focus on achieving results rather than complying with burdensome and tedious rules is essential.

To be effective, managers must be provided training related to evolving leadership competencies. We applaud the provisions in this bill which protect managers' and supervisors' rights during appeals, grievances and other litigious actions.

Unfortunately, it is becoming increasingly common for managers in the Federal service to be personally sued by private citizens, or even other employees for actions they have taken during the course

of their duties. Agencies should be authorized to reimburse managers for professional liability insurance premiums.

An important tool for managers is confidence that they have the skills necessary to lead in a changing environment. All too often, the resources for training, particularly management training, are among the areas hardest hit during times of declining budgets. We applaud the proposal in the bill which will require OPM to collect and annually submit information concerning agency training programs.

We also recommend that OPM monitor the percentage of agency training funds spent on general training, including management training, to ensure that agencies remain committed to employee development, especially in times of downsizing and budget reductions.

In closing, Mr. Chairman, of the four points I have just discussed, the issue that is unacceptable to us is the RIF retention formula. As you know, RIF's are devastating, regardless of formula. Managers in the Federal service are dedicated to the business interests of the Federal Government. Building a retention formula on a flawed performance appraisal system is like building a house on an infirm foundation, a serious mistake. Managers are as concerned for those employees who will remain to perform the Government's business after a RIF and managers must be able to count on both the experience base and its resilience coupled with recent stellar performance.

Mr. Chairman, we believe that this bill has many positive features which have the potential to enhance the morale and productivity of the Federal work force at a time when it is sorely needed.

This concludes my prepared statement, Mr. Chairman. I will be pleased to answer any questions that you have.

Mr. MICA. Thank you for your testimony.

Now I will recognize Ronald P. Sanders, director of the Maxwell Center for Public Management.

You are recognized, sir.

Mr. SANDERS. Thank you, Mr. Chairman. I appreciate the opportunity to appear before you today to discuss the Omnibus Civil Service Reform Act of 1996.

As you know, over the past 3 years, there has been much talk about the need to reinvent or better yet transform our Nation's civil service system in order that the Federal Government be better able to meet the challenges of a turbulent and more demanding future. To that end your bill represents an important step in the right direction and with only some reservations, I would hope that the Congress takes swift action to pass it this session.

These reservations stem from the potentially unrealistic expectations that may be engendered by the legislation, expectations that may vitiate the energy needed to see this effort, begun by the bill here at issue, through to its ultimate and necessary conclusion. In this regard, I hope that I am correct in assuming that you do not intend this bill to correct all of the myriad structural, cultural and technical deficiencies that have become so apparent in the present one-size-fits-all system. There is a growing consensus, amongst theorists and practitioners alike, that the system requires major overhaul. Based on a bureaucratic model of government, it is predicated on an outdated penchant for uniformity and stability, a re-

quirement that no longer comports with today's chaotic, uncertain environment. And if this bill passes, there is the danger that many will assume that the system has been fixed.

While the legislation before us does deal with some of the more pressing of those ailments, such as the much needed triple bypass surgery on the mixed case process, its principal value may be to encourage experimentation for the future. In this context, the additional demonstration project authority proposed by the bill is fine as far as it goes.

Let us be blunt about the purpose of demonstration projects. They are a little bit like aspirin. They are not and never really were intended to be grand experiments in the design of social systems so much as temporary relief from the headache of rigid civil service rules. That is why agencies so zealously seek such authority, and to portray them as something pseudoscientific, with experimental hypotheses and control groups, is to invite disappointment.

I speak from experience. There are just too many variables at play in any given project to be able to make viable, reliable inferences about the link between personnel policies and the behavior of a complex social system like a Federal agency and much less the Federal Government as a whole.

Demonstrations represent a much more basic strategy of learning by doing and should be treated accordingly in the law. So should their ultimate purpose. What is the objective of a demonstration project? In my view, these projects are never going to provide the answer to what ails the civil service, simply because that answer does not exist. There is not one single solution but many, each tailored to a particular mission and performance measures of a given agency or department and each should be able to devise its own, so long as it comports with a governmentwide framework of bedrock principles, principles like merit or veteran's preference. This is an approach taken by the United Kingdom and New Zealand and Australia and other western democracies, and we can certainly stand it as well.

Therein lies the strategic purpose of demonstration projects as prototypes for eventual agency-specific alternative personnel systems.

Even in the case of benefits like leave and health, I know that experimentation there is problematic and scary, but there are some interesting things going on in the private sector, things like all purpose leave and cafeteria health benefits that would probably never see the light of title 5 if they had to be enacted on an all or nothing proposition for the entire Government as a whole.

However, in so doing, you must consider the impact on the Federal Government's well-established framework of due process and appellate protections for employees. Those protections embedded in title 5, as well have been interpreted and applied by the Federal courts over the course of years and include third party review of certain personnel actions. While cumbersome, they have never really been a point of contention and I am not sure it is worth all of the litigation it may engender if they are waived.

Regarding the remaining sections of the bill, I believe that with relatively minor changes they will more or less effectively serve their intended purpose. For example, the subcommittee's efforts

with respect to streamlining complaint systems are especially laudable. Like them or not, such systems are necessary. However, rumors to the contrary, there is no rule that says those systems must be arcane and the proposal represents a vast improvement over current law.

For example, by eliminating mixed case procedures, including so-called special panels, the system becomes dangerously close to being understandable and workable, so do not give up.

With respect to discrimination complaints generally, the notion of private sector-like systems for Federal employees sounds nice, but absent a substantial increase in staff, the EEOC is simply not equipped to deal with the added volume of complaints, and an already slow system runs the risk of getting slower.

On the plus side, the bill's mandatory 90-day alternative dispute resolution step is essential and I would strongly support it.

The bill's performance management provisions are also long overdue and, at the very least, they send an important signal to employees and the public. For example, as a general matter, it is about time that longevity-based within-grade pay increases were explicitly linked to fully successful performance. Indeed, who could argue otherwise? One should be treated as a consequence of the other and employees who do not meet that minimal standard of performance have more than adequate means of seeking redress on that issue. They do not need an additional right of appeal on the denial of an increase based on that standard.

Finally, Mr. Chairman, I would like to comment on the bill's soft landing provisions. I wholeheartedly support the signal sent by codifying the requirement to establish an agency priority placement program, but once again you should guard against too much statutory detail. Moreover, the bill seems to be silent with regard to cross-agency placement rights, especially within a commuting area, if that is likely to be the greatest opportunity for successful employee transition.

I know that in revamping its own regulatory placement program OPM considered and deliberately declined to extend mandatory placement rights across agency lines, but it is not clear whether you have made a similar judgment.

Finally, there is the matter of the level of qualifications required to trigger an employee's mandatory placement right. As I read it, the bill would mandate placement if a surplus employee is minimally qualified for a vacant position.

While this is common practice during RIF, it is problematic in post-RIF placement situations. In Defense, we require that placement candidates be well qualified for a vacant position, this in an attempt to strike a balance between employee assistance and employee performance.

This policy necessitated some human judgment, but we felt it was worth it, especially with regard to supervisory acceptance. It is not easy having a new employee forced on your organization and there should be no question that that employee will be able to do the job and do it well. I would urge you to talk to the experts at Defense if you have not already.

Mr. Chairman, that concludes my preliminary comments and observations on the bill. Obviously it contains a whole host of other

important provisions and my uncharacteristic silence on them should be construed positively. In this regard, I commend the subcommittee for its work and I wish you luck.

Thank you.

[The prepared statement of Mr. Sanders follows:]

Statement
of
Dr. Ronald P. Sanders, Director*
Maxwell Center for Advanced Public Management
Syracuse University

before the

Subcommittee on Civil Service
Government Reform and Oversight Committee
U.S. House of Representatives

July 16, 1996

Mr. Chairman, I appreciate the opportunity to appear before you today to discuss the proposed Omnibus Civil Service Reform Act of 1996. As you know, over the past three years there has been much talk of the need to reinvent and reform -- or better yet, transform -- our nation's civil service system, in order that the Federal government be better able to meet the challenges of a turbulent, more demanding future. To that end, your bill represents an important step in the right direction, and with only some reservations (and modifications), I would hope that the Congress takes swift action to pass it this session.

These reservations stem from the potentially unrealistic expectations that may be engendered by your legislation, expectations that may vitiate the energy

* The opinions expressed herein are solely those of the author and do not represent the position of Syracuse University or the US Department of Defense. Moreover, this testimony has not been cleared by the Office of Management and Budget or DoD.

needed to see this effort, begun by the bill here at issue, through to its ultimate and necessary conclusion. In this regard, I hope that I am correct in assuming that you do not intend this bill to correct all of the myriad structural, cultural, and technical deficiencies that have become so apparent in the present "one size fits all" Federal human resource management system. There is a growing consensus, among theorists and practitioners alike, that that system requires major overhaul -- based on a bureaucratic model of government, it is predicated on an outdated penchant for uniformity and stability, a requirement that no longer comports with today's chaotic, uncertain environment -- and if this bill passes, there is a danger that many will assume that the system has been fixed.

You know far better than I the limited attention span of the public (not to mention the Congress and the Executive Branch) when it comes to such relatively unglamorous issues as these, and it may be difficult to recapture the political will required to consummate this transformation if those various stakeholders are left with the impression that the system's many ills have been miraculously cured. While the legislation before us does deal with some of the more pressing of those ailments (such as the much needed "triple bypass" surgery on the mixed case process), its principal value may be to encourage experimentation for the future -- experimentation that by definition must lay a solid empirical and experiential foundation for more sweeping systemic changes.

In this context, the additional demonstration project authority proposed by the bill is fine -- as far as it goes. However, even more flexibility is necessary if

these experiments are to achieve their intended purpose. In this regard, let's be blunt about that purpose: demonstration projects are not (and never really were) grand experiments in the design of social systems so much as temporary relief from the heartburn of rigid civil service rules. That is why agencies so zealously seek such authority, and to portray them as something pseudo-scientific -- with experimental hypotheses and control groups -- is to invite disappointment. There are just too many variables at play in any given project to be able to make valid, reliable inferences about the link between personnel policies and the behavior of a complex social system like a Federal agency (much less the government as a whole). Demonstrations represent a much more basic strategy of "learning by doing" and should be treated accordingly in the law.

So should their ultimate purpose. What is the objective of demonstration projects? In my view, these projects are never going to provide "the" answer to what ails the civil service, simply because that answer does not exist. There isn't one single solution; there are many, each tailored to the particular mission of a given agency or department, and ideally, each should be able to devise its own -- so long as it comports with a government-wide framework of bedrock principles (like merit and veterans preference). Therein lies the strategic purpose of demonstration projects, as prototypes for eventual agency-specific alternative personnel systems. If this is the case, the more experimentation the better -- ten demonstrations may not be enough, even if five of them could conceivably cover entire agencies. And what happens to those agencies that

are "left out" of the initial allocation of projects? Cabinet departments and executive agencies would be better off with their own authority (subject to OPM oversight) for multiple demonstrations, variations that can be tested, adjusted, and perfected with minimum procedural encumbrances, unless and until broader implementation is proposed. This is "action research" in its truest sense, and agencies should be allowed wide latitude in its conduct.

On the other hand, if the purpose of demonstrations is to seek out the one best way of transforming our entire Federal civil service, the legislation you have crafted may eventually suffer from unduly raised expectations. The same may be said for its impact on the Federal govemment's well-established framework of due process and appellate protections for employees. Those protections, imbedded in title 5 US Code, have been interpreted and applied by the Federal courts over the course of years, and include third party review of certain personnel actions. While cumbersome, they have never really been a point of contention. However, under the bill's demonstration project provisions, it is unclear whether those protections (as further enumerated in case law) would still apply to an agency -- and more importantly, to its employees -- engaged in a demonstration project. Would an agency be required to establish its own, replete with an impartial dispute resolution system, as a condition precedent to demonstration authority? If so, would that tribunal be granted any administrative deference by the Federal courts, as they do with the Merit Systems Protection Board (MSPB)? Alternatively, absent some agency-based adjudicatory system,

would employees be able to appeal adverse actions directly to Federal court? These are vexing questions, and I am no expert; consequently, I strongly recommend further study here -- or alternatively, the requirement that demonstration agencies just remain subject to MSPB jurisdiction.

The various objectives of the bill's remaining sections are not nearly so difficult to discern or discuss, and as a general matter, I believe that with relatively minor changes they will more or less effectively serve their intended purpose. For example, the Subcommittee's efforts with respect to streamlining complaint systems are especially laudable. Like them or not, such systems are necessary; however, rumors to the contrary, there is no rule that says they must be arcane, and the proposal represents a vast improvement over current law.

This is especially the case with respect to the processing of so-called mixed cases. By eliminating mixed case procedures, including so-called Special Panels, the system comes dangerously close to being understandable -- and even workable. However, the bill still seems to offer employees a choice of forums in such cases, where access to the Merit Systems Protection Board (MSPB) is sufficient. With respect to discrimination complaints generally, the notion of a "private sector-like" system for Federal employees sounds nice, but absent a substantial increase in staff, the Equal Employment Opportunity Commission (EEOC) is simply not equipped to deal with the added volume of complaints -- and an already slow process would just get slower. On the plus side, the bill's mandatory 90-day alternative dispute resolution (ADR) step for

discrimination complaints is absolutely essential. You may not realize the sheer volume of discrimination complaints handled by some agencies because most are informally resolved, and without some similar requirement for conciliation, an amended system could quickly become gridlocked by litigation.

The bill's performance management provisions are also long overdue, and at the very least, they send an important signal to employees and the public. For example, as a general matter, it is about time that longevity-based within-grade pay increases were explicitly linked to fully successful performance (indeed, who could really argue otherwise) -- one should be treated as a consequence of the other, and employees who do not meet that minimal standard of performance have more than adequate means of seeking redress on that issue -- they do not need an additional right to appeal the denial of an increase based on that standard. Similarly, it is about time that improvement periods in performance-based actions were made optional, so long as it is clear that the ultimate evidentiary standard in such actions remains "substantial" and not the more difficult "preponderance." And who could not support giving even greater weight to performance in reduction-in-force (RIF) proceedings?

However, I remain skeptical of the "one size fits all" approach to performance management which characterizes the bill, especially with respect to performance ratings in RIF. Is it really necessary to specify the minutia of relative rating weights in statute? Is it really appropriate for Federal law to attempt to prescribe individual point values for every possible performance

appraisal permutation potentially encountered by the Federal government's more than 1.5 million employees? Given the three-to-five year "half-life" of any performance management system, this seems to be asking for trouble. Without disturbing other mandatory provisions such as veterans preference, why not establish a set of general principles -- for example, greater retention standing for better performance -- and give agencies the freedom to tailor the details? Given that RIF competitive areas (and RIF competition) are almost exclusively internal to an agency, there is no compelling need for this level of uniformity across all agencies. Let agencies figure out how best to implement it, subject to OPM approval and oversight to insure compliance -- in principle!.

In this regard, I hope no one thinks these RIF weights are a permanent solution. As noted, conventional wisdom suggests that performance management systems have a relatively short half-life -- in other words, it takes just a few years for everybody to figure out how to game the system, and then you need to implement a new one. This just a fact of life, and when it is coupled with the phenomenon of ratings inflation (something that is certainly not unique to civil service), the net result over time will still be retention based on seniority: high ratings for almost everybody will eventually "wash out" and leave years of service once more as the primary distinguishing factor in RIF. However, every little bit helps; I especially like the notion of adding the three years of ratings point values instead of averaging them; this may mitigate some of the inflation effects, at least at the margin. However, absent retention based on some sort of

forced-choice ranking system (something I do not advocate) or peer review and retention (something that is impractical for large numbers of employees), this will do for a while. It's just that it would be nice if it took something less than an act of Congress to recalibrate the system in a few years, after employees and managers adjust and adapt to it.

With respect to the bill's "soft landing" provisions, I wholeheartedly support the signal sent by codifying the requirement to establish agency priority placement programs, but once again you should guard against too much legislative detail. In my DoD experience, we were able to fine-tune our very successful Priority Placement Program (PPP) to suite our changing circumstances -- and to do it quickly, because it was our program. Obviously, it becomes much more difficult to do so if certain requirements are imbedded in law. Secondly, the bill seems to be silent with regard to cross-agency placement rights, especially within a commuting area, yet this is likely to provide the greatest opportunity for successful transition.

I know that in revamping its regulatory placement program, OPM considered and deliberately declined to extend mandatory placement rights across agency lines, but it is not clear whether you have made a similar judgment. Note that we struggled with this in DoD (between our components), and while it is beyond the scope of this hearing, I would refer you to their experience -- especially in offering buy-outs and other incentives across organizational boundaries to create vacancies for surplus employees in a

commuting area. I would also refer you to DoD's experience concerning the use of outplacement incentives (or employee "dowries").

That experience may be especially instructive in considering a matter of potentially greater consequence: the level of qualifications required to trigger an employee's mandatory placement right. As I read it, the bill would mandate placement if a surplus employee is minimally qualified for a vacant position. While this is a common practice during RIF (within a competitive area and level), it is problematic in post-RIF priority placement situations. In DoD, we required that placement candidates be "well qualified" for a vacant position, this in an attempt to strike a balance between employee assistance and performance. This policy necessitated some human judgment (and some bureaucracy to administer, although automation has ameliorated this), but it was worth the trouble, especially in terms of supervisory acceptance -- it's not easy having a new employee forced on your organization, and there should be no question that that employee will be able to do the job well. Again, I would urge you to talk to the experts at Defense if you haven't already.

Mr. Chairman, that concludes my preliminary comments and observations on the bill. Obviously, it contains a host of other important provisions, and my uncharacteristic silence with respect to those provisions should be construed positively. However, I must close by repeating the concern expressed at the outset: the bill must be put in its proper strategic context. It is not (I hope) intended to be the "be all and end all" of civil service reform legislation. It is an

important first step, but only that -- particularly insofar as its demonstration project provisions are concerned. It does not yet give us the tools to craft a Federal civil service for the 21st century, and I implore you to signal the ongoing nature of that challenge to all concerned (perhaps by indicating that you would consider authorizing a second, even broader set of demonstrations next year, and maybe even the year after that). Perception is all too often reality, and if this bill is perceived as a quick and final fix for Federal human resource management, we may not be able regain the energy to confront its much more complex and problematic reality in time.

Mr. Chairman, I thank you once again for the opportunity to offer my thoughts on this legislation. I would be pleased to respond to any questions you and your Subcommittee may have at this time.

Mr. MICA. Thank you for your testimony.

I will recognize now the gentlelady from Maryland for questions. Mrs. Morella.

Mrs. MORELLA. Thanks, Mr. Chairman.

I want to thank this very important panel for their testimony which I have read and heard, Mr. Sanders.

I guess there is one question for all of you and that is I know that you have concerns about the sections that would increase the weight of performance ratings in RIF's and repeal, actually repeal, the right of employees to appeal within-grade increases to the MSPB.

I wonder what tools would you suggest that we provide to Federal managers to deal with poor performers and to reward outstanding workers? I mean, we have debated this and just wondered about what suggestions that you may have.

Ms. OLSEN. You have some tools that you are offering in the bill, the alternative dispute resolution and that type of thing that allow us to talk one on one with employees when we have a problem. Sometimes it is a communication problem and this will allow a process that managers can use to get at this issue.

I do not know if any of my other colleagues have suggestions, but I know that this is——

Mrs. MORELLA. Do you think that that would be adequate?

Ms. OLSEN. No; not entirely. Not in and of itself. One of the things that I suggested earlier is that we really need an objective results-based performance appraisal system. It is a very highly subjective system. No one is pleased with the system as it is currently constructed and perhaps this will be an area that would be ripe for demonstration projects such as the ones being proposed.

Mrs. MORELLA. What do you think, Mr. Moyer?

Mr. MOYER. This is not an area that necessarily lends itself to solution or resolution by statutory change alone. We are dealing with the most basic relations between human beings in the workplace that involve the cultivation of effective communication, trust, and collaborative working relationships. Many supervisors have never received the most basic training in the supervisory skills involving communication and supervision.

The degree to which downsizing has created more and more demands upon supervisors to supervise larger numbers of employees and to become more additionally involved in the technical demands of their area has placed even less priority and time and attention for effective communication that can help to yield improved performance.

What I am getting to is that some of the tools that exist within this bill, for example, dealing with the PIP period, and we do not necessarily favor the elimination wholesale of PIPs but the statutory elimination of that in order to provide greater discretion to agencies to come up with shorter or equal periods if they so desire we believe is one way to more effectively streamline the process for performance management and the removal of poor performers.

Mrs. MORELLA. Interesting. So you think those tools as well as training, making sure that we have adequate training of our professionals and supervisors. Would you like to take a shot at that, Mr. Sanders?

Mr. SANDERS. Mrs. Morella, I think I would take a slightly different view. I do not really have a lot of problem with the principle, that is, that retention standing should be improved on the basis of better performance.

I do not know if we are ever going to devise a system, in statute or otherwise, that eliminates human judgment in performance appraisal. My own experience is that the key to that is to have employees and managers participate in the development of those systems. If they have some ownership in them, they are much more likely to place their faith in them, they are much more likely to have credibility with employees, and the notion of tying retention to performance will be much less threatening to them.

So I think the flexibilities provided first by OPM in some of its regulatory revisions, and even more so in some of the demonstration provisions here will allow employees and managers to design their own systems and my own view is we should assert the principle for them, that is, retention is improved on the basis of better performance, but perhaps avoid some of the detailed minutia that is contained in this bill. I am not sure trying to establish point values for every possible permutation is the way to go. On the other hand, I would not at all compromise on the bedrock principle that those point values manifest.

Mrs. MORELLA. Thank you.

Thank you, Mr. Chairman.

Mr. MICA. Thank you.

I have no questions.

This panel is dismissed, and I will call our next panel.

Panel 3 is Gary Divine, national president, National Federation of Federal Employees; Christopher Donnellan, National Association of Government Employees; Mark Roth, general counsel, American Federation of Government Employees; and Robert Tobias, national president, National Treasury Employees Union.

If you will just remain standing, since we are an investigations and oversight subcommittee, and raise your right hand.

[Witnesses sworn.]

Mr. MICA. The witnesses answered in the affirmative, and I welcome the panel. And, as I have told the previous witnesses, if you would like to summarize your statement and have the entire statement and additional comments as part of the record, they will be most welcome. We would like to hear your commentary on some of the suggested legislative proposals before us.

We will first welcome Gary Divine, national president of the National Federation of Federal Employees.

Welcome, and you are recognized.

STATEMENTS OF GARY DIVINE, NATIONAL PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES; CHRISTOPHER DONNELLAN, NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES; MARK ROTH, GENERAL COUNSEL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; AND ROBERT TOBIAS, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION

Mr. DIVINE. Good afternoon, Mr. Chairman and members of the subcommittee.

On behalf of the National Federation of Federal Employees, I am pleased to be here this afternoon to offer our comments on the Civil Service Reform Act of 1996.

At the outset, NFFE would like to thank the committee for including the soft landing provisions in the legislation. The soft landing provisions certainly will be welcomed by the Federal work force. However, NFFE has maintained that separate incentives are the most effective humane way of dealing with downsizing the Federal work force. While NFFE recognizes the subcommittee has decided against a new governmentwide buyout program, we do urge the subcommittee to speedily approve buyout authority for those agencies most severely impacted by cutbacks.

Additionally, NFFE would like to support Representative Morella's 2 percent solution and believes that the adoption would significantly reduce the adverse impact of downsizing on the Federal work force.

The soft landing provisions aside, NFFE has several major concerns with the legislation. With your permission, I will highlight a few of our concerns.

While NFFE supports the use of demonstration projects in the Federal Government, we believe that these projects should be limited to those agencies where labor-management partnership agreements are in place and the union is allowed to participate as a full and equal partner. NFFE maintains that only through the involvement of the employees and their union representatives in the development of demonstration projects shall the projects succeed.

Additionally, we are concerned about the potential scope of the demonstration projects under the bill. Although the bill does limit the number of demonstration projects exceeding 5,000 employees, it places no cap on the total number of employees that can be under the demonstration projects.

We fear that with no such cap the size of demonstration projects could possibly exceed over one-half to three-quarters of all the Federal employees could find themselves on these projects.

In order to avoid this, NFFE recommends that the subcommittee limit the total percentage of Federal work force that may be placed under such projects to 10 percent. By doing so, the subcommittee would allow the demonstration projects to go forth while at the same time preventing the implementation of an untried and potentially damaging plan on a wide spectrum of the Federal work force.

Additionally, NFFE is concerned about the provisions that would minimize the number of nonwaiverable restrictions on the demonstration projects. We contend that there is no need for such action. Indeed, a minimization of waiver restrictions will only lead to instances which will harm employees, reduce morale and thereby decrease the effectiveness of the demonstration project.

Likewise, NFFE has several concerns on the appeals portion of the act. The subcommittee has provided NFFE with a summary of the changes that it proposes for the Equal Employment Opportunity appeals process. These changes would virtually eliminate the employee's rights to combat discrimination in the work force. NFFE is adamantly opposed to these proposals.

I would like to stress that there is a much better solution to the problems of the Federal EEO complaint process than the proposal

the subcommittee has developed. The Federal Employee Fairness Act would streamline the Federal EEO process in a manner sought by the subcommittee without depriving employees of important safeguards. NFFE strongly supports the Federal Employees Fairness Act and strongly recommends that the subcommittee adopt this proposal.

The Federal Government has long been committed to ensuring that the workplace is free from discrimination. The committee's proposal signals an abandonment of that historical commitment. Obviously, NFFE will have more specific objections on this portion of the bill once we are provided the actual statutory language.

As we have demonstrated time and time again in the last few years, NFFE is committed to reforming the EEO process, a process that does not work and costs too much. The changes you have proposed, however, will eliminate the EEO enforcement and permit discrimination to flourish in the Federal work force.

An additional matter I would like to address to the subcommittee is a proposal that requires that binding arbitration be deleted from the labor relations statute. The subcommittee has claimed that this proposal will increase the flexibility of union and managers to design alternate dispute resolution processes. This proposal is totally unnecessary and would greatly erode employees' abilities to enforce their rights.

The current statute requires only binding arbitration in one specific procedure, the negotiated grievance procedure. Employees and unions are free to negotiate other alternate dispute resolution processes if they desire and many locals have ADR procedures already in place. Such procedures can be useful; however, an employee should not be required to give up their right to have a neutral third party resolve disputes in order to use these less formal procedures.

Under performance management, while NFFE understands and supports the committee's desire to reward superior performance, we believe that the proposal to attach significantly higher years of RIF credit to performance rating has several flaws.

First, NFFE asserts that the current rating system is already severely flawed and handicapped by a lack of a single governmentwide objective standard. Performance that may be rated fully successful or exceeds fully successful in one office may be only rated fully successful in another. This nonuniformity renders any attempt to implement a governmentwide program based on performance ratings inherently unfair and inequitable. This reason alone is sufficient to reject this proposal.

Second, not all employees are assessed underneath the five level rating system which is the foundation of your proposal. This fact could lead to situations where employees assessed under one system could find themselves competing with employees rated under a different system. This would lend to significant disparities. For example, under your proposal, an employee in a pass/fail system who receives a pass rating could receive no more than 7 years of credit for RIF purposes while an employee in a five-tier system could receive 10 years credit for the same quality of work. Clearly the pass/fail employee is at a severe disadvantage in a RIF situation under your proposal.

Finally, NFFE maintains that the current RIF credit values for performance values would lead to situations where performance appraisals will not be a true reflection of the employee's performance but instead a statement of which employee management wants to retain for a RIF. In effect, this proposal could lead to a designer RIF, a situation where managers through selective performance ratings can sidestep current objective RIF procedures and ensure that his or her favorite employee remains employed while employees who are less favored, such as whistleblowers and union officials, would be separated.

NFFE is also opposed to the elimination of the mandatory requirements for the performance improvement plans. NFFE maintains that PIPs are a very useful tool in work force development and that their elimination would significantly reduce the skill levels of the work force. The PIP provides both managers and the employee the opportunity to identify those areas of employee performance in need of correction. By providing employees a chance to correct performance problems, the PIP serves as a valuable role in creating a more effective and skilled work force.

Another area of concern for NFFE is the elimination of the employee's ability to appeal denial of a within grade increase. NFFE does not oppose the decision to eliminate the appeals of within grade denials because we understand such a decision may be appealed underneath the negotiated grievance procedure. However, we strongly oppose any attempt to eliminate an employee's ability to grieve the denial of a within grade increase.

In conclusion, Mr. Chairman, NFFE has significant concerns with the provisions of the Civil Service Reform Act of 1996. If these concerns are addressed as we have suggested, NFFE would be glad to support the legislation.

Once again, Mr. Chairman, I thank you and the members of the committee for the opportunity to appear here before you this afternoon, and I would be happy to answer any questions that you may have.

Mr. MICA. Thank you for your testimony.

And now we will recognize Christopher Donnellan, National Association of Government Employees.

You are recognized.

Mr. DONNELLAN. Mr. Chairman, Mrs. Morella, my name is Christopher Donnellan and I am the legislative director of the National Association of Government Employees.

The National Association of Government Employees is an affiliate of the Service Employees International Union, the third largest union in the AFL–CIO. NAGE represents more than 150,000 Federal employees in various agencies from civilians in the Defense Department to employees in the Veterans' Affairs Administration, the Forest Service, and the Transportation Department. On behalf of our membership, NAGE is pleased to appear before this subcommittee regarding the Omnibus Civil Service Reform Bill of 1996.

NAGE is proud of its members working on behalf of the American people. They are some of the most hard-working, competent, and loyal workers this country has. NAGE once again wishes to state its belief that employees should be retained on the basis of

the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

Today, we are here to discuss legislation that would greatly affect these workers I just described. The Omnibus Civil Service Reform Bill of 1996 includes many measures relevant to the Federal employee. We once again appreciate the opportunity to discuss these proposals individually.

NAGE has serious questions on title I of the legislation that deals with demonstration projects. NAGE could support legislation for demonstration projects if unions were given the right to bargain over the substance of the working conditions involved in such projects. However, this legislation glosses over employee desires as represented by their democratically elected union officials.

We do not feel that bargaining after impact is in any way substantive to good labor-management relations. The success of a demonstration project is dependent upon early support from all participants. The agency and union together should negotiate and develop a plan which identifies the purpose, methodology and duration of the plan.

NAGE believes that this legislation allows agencies to unilaterally plan a demonstration project and consult with the major union involved only shortly prior to implementation. This legislation directly contradicts modern concepts of labor-management relations and significantly Executive Order 12871 and the burgeoning partnerships in the Federal Government.

Another example of unsupportable legislation is the provision entitling waiver of a requirement that employees represented by a labor organization not accorded exclusive representative rights are prohibited from inclusion in the demonstration project. The rationale for this current section of law is sound. Conditions and issues are different in each locale and represented by distinct and different unions. The deletion of this provision excludes the voice of workers affected by a demonstration project for no justifiable or articulated reason.

NAGE was founded on the belief that Federal employees must be provided with due process when any governmental action is being taken against them, including Federal employee appeals of adverse actions or disciplinary actions in both conduct and performance cases.

Regarding title II of this legislation, NAGE is concerned about the elimination of 5 U.S.C. section 7703, which would eliminate judicial review from all cases. The elimination of judicial review, which would make the Merit Systems Protection Board the final arbitrator, would be egregious.

NAGE will continue to support measures that encourage alternative dispute resolutions. While we support these measures, we believe that any language added to this legislation that would require employees to submit to ADR techniques in lieu of other administrative or judicial remedies would waive employees' rights.

NAGE has concerns over the changes in streamlining the appeals process. We all understand that there is some overlap in the system. We also believe in regards to a discrimination suit there should be adequate protections for that individual. Accordingly,

changes in the appeal system should be discussed by all relevant parties, including unions, prior to the introduction of future legislation.

As you know, Mr. Chairman, the unions have fought hard to protect its members during RIF's and that is why we have serious reservations concerning section 301 of title III of this bill. Increasing the amount of points based upon a subjective performance provides managers with an opportunity to support favoritism over seniority. The idea should be to support our experienced workers and not to seek alternatives to seniority as a factor in RIF's.

We are also concerned about section 302, streamlining Federal dispute resolution process. This proposal to repeal appeal rights when a within-grade increase is denied forfeits the workers to improve his or her performance.

Regarding the reorganization flexibility, while we tend to agree with these two provisions, we must again mention the need for buyouts. The National Association of Government Employees understands a consensus has been reached between Congress and administration. The Government needs to be downsized. NAGE will continue to lobby for the effective use of buyouts. We believe buyouts are essential in order to minimize the detrimental impact of job loss on employees and their families.

NAGE strongly supports the idea that the thrift savings plan needs to be expanded. The Federal employee understands the enormous responsibility to his or her retirement. By allowing investors to make contributions up to the annual cap set by the IRS on such investments, currently $9,500, you have given the Federal employee more opportunity to save.

Another provision of this legislation would authorize two additional TSP funds, one tracking small U.S. stocks and one an international fund, thereby increasing the TSP funds to five. By adding two new options to Federal employees' retirement investment portfolios, it could increase their investment earnings for retirement and it would allow Federal workers to take a more active role in their retirement.

We would like to personally thank Representative Morella for her efforts on behalf of Federal employees.

Mr. Chairman, I would like to thank you again for this opportunity to testify. While NAGE has many concerns regarding the Omnibus Civil Service Reform Bill of 1996, we are eager to work with the subcommittee to increase Government efficiency and enhance dispute resolutions.

I would be happy to answer any questions that you may have.

Mr. MICA. Thank you, and we will withhold questions.

I apologize to Mr. Tobias. I am going to let you testify next.

I should let the national president testify first and he got out of line. I just asked staff how that could happen and I found out alphabetically you are disadvantaged.

Mr. TOBIAS. That is merely one more of my disadvantages, Mr. Chairman.

Mr. MICA. Well, I will recognize you now and certainly attorneys and general counsels rank at the bottom of the list.

Mr. Roth, we will hear from you last.

Welcome back, Mr. Tobias.

Mr. TOBIAS. Thank you very much, Mr. Chairman.

I appreciate the opportunity to testify on the Omnibus Civil Service Reform Act of 1996. And, frankly, Mr. Chairman, there is much to like in this proposed legislation and much to support in the draft bill, but, Mr. Chairman, I would like to use my limited time to discuss those areas which I urge you and the committee to consider changing in the proposed bill.

First, NTEU supports the creation of demonstration projects. There should be more projects. We should not have the limitations that are contained in the draft bill. We should have more experiments, more attempted innovation. We urge allowing more of these to occur.

But these experiments must occur in the context of an environment that allows for a proper evaluation of the effort. If, as the draft bill states, an agency would have the authority to waive the provisions in title V concerning classifications, promotions, and hours of work and the other many waivers that could occur to create a demonstration project and then impose that project on a work force notwithstanding the existence of an exclusive representative and existing collective bargaining agreement, the whole purpose of demonstration projects will be defeated.

Unilaterally changed conditions of employment do not create a scientific atmosphere conducive to the evaluation of changed circumstances. Let us have more demonstration projects and let us have them in the context of a supportive environment where a test can be truly evaluated and applied if successful, across the Government, or dumped if it is unsuccessful. But, unilaterally imposing the terms and conditions of employment will not create a testing atmosphere.

Second, commenting on the title in the bill entitled "Streamlining the Appeals Procedures" is somewhat difficult because specific statutory language is not included. Rather, all we have is a draft summary. But it does appear to eliminate de novo judicial review in district court for discrimination claims, internal agency or EEO review processes, and makes MSPB the exclusive process for discrimination complaints.

The bill would not create rights similar to private sector employees. It would significantly reduce Federal employee rights.

NTEU urges the committee to consider the Federal Employee Fairness Act to solve the mixed case agency appeals and prompt solution of discrimination complaints problems.

Finally, elimination of binding arbitration in this title of the bill, as suggested, will not streamline appeals procedures. It will reintroduce uncertainty and increase court challenges. Both management and employees need binding final decisions, not continuing litigation in the workplace over unresolved problems.

Third, the section entitled performance management enhancement is also an area of great concern. The bill would give greater weight to performance in connection with RIF's. That idea has great credence among some persons. The idea is to keep those who are performing best in Government jobs.

Enacting this law, however, would not achieve its stated goal because the current evaluation system in the Federal Government cannot do the job of differentiating the job performance of Federal

employees. Too much is left to the subjectivity of individual managers. Too much depends on the personality of the supervisor and how that person fits with the employees supervised. And too much is left to the arbitrariness of the system itself.

For example, how many elements and how many standards, how specific are the standards of performance which may vary from one work group to another? So when employees are compared one against the other, the system itself does not allow for a basis of fair and accurate comparison.

The current system cannot do the job. Do not increase the arbitrariness of the performance system by linking it more closely to the RIF system.

Fourth, the soft landings portion of the bill contains several provisions beneficial to Federal employees, but NTEU strongly and unequivocally opposes the statutory language to reduce the Federal work force. It is on its way to a 12-percent reduction since 1992. At 2 million, where it is today, or just under 2 million, we are less than the 2.2 million Federal work force in 1946 when the population was 140, not 250 million, as it is today. Arbitrary reductions in the Federal work force will not solve what ails our country.

Finally, I would like to urge the committee to incorporate buyout incentives into its legislation. If the goal is reducing the work force at the least cost, and that cost not only includes direct RIF costs but also costs of the disruption of a RIF and the costs of having the wrong people in the wrong job, incentives are by far cheaper.

So, Mr. Chairman, as I said, there is much to support in the bill and my testimony is clear on that. These remarks are to point out those areas where I hope the committee will consider changing the draft legislation to, I believe, make it more fair, more just, and accomplish some of the goals articulated in the background material prepared by the committee.

Thank you very much.

Mr. MICA. Thank you, Mr. Tobias.

I will now recognize Mark Roth, general counsel of the American Federation of Government Employees.

You are recognized, sir.

Mr. ROTH. Thank you, Mr. Chairman and Mrs. Morella. AFGE appreciates this opportunity to provide our comments on the various proposals being considered. Certainly in this era of reinventing government to make it more efficient and effective and truly a competitive customer oriented service operation, the civil service system should be revisited.

The key to meaningful reform, however, is that any proposal have the basic support of the stakeholders: the employing agencies, unions, employees, managers, and even the public. I am sorry to say that some critical provisions of the bill do not enjoy this support.

While the bill contains many meritorious provisions which we support and wholeheartedly endorse, particularly in titles IV, V, and VI of the omnibus proposal, it also contains as currently drafted a number of proposals which would thwart real accountability, do not afford equal treatment and eliminate rights without any supportable justification.

Without any offense meant to the committee, I will be focusing my oral statement on the provisions we find most objectionable.

AFGE is most concerned about certain waiver provisions pertaining to demonstration projects; increased weight of performance appraisals for RIF purposes; the elimination of various appeal rights; and the so-called due process rights of managers. We also have serious concerns about the proposed reform of the EEO complaint process without the requisite funding.

First, I want to applaud the chairman's recognition of the need to expand current demonstration project authority. AFGE is very proud of the fact that we have been involved in a number of demonstration projects and each has been vastly different. Some have been in DOD, others have been in VA. We have always learned that the key to the success of such projects has always been, as Dr. Sanders said, employee involvement.

Mr. Chairman, as written, the omnibus civil service reform measure would negate that involvement, lessen that involvement. Not only do the provisions permit only token 30 days notice to affected employees without requiring any input from those employees, but the draft rewrite of 5 U.S.C. 4703(f) would permit agencies to abrogate provisions of collective bargaining agreements that have rolled over or been entered into after passage of the act and establish demonstration projects covering affected employees which contravene the very agreements that were just negotiated.

When employees are involved, we must tell you that the security of their bargaining contracts must be in place and allow them the security of buying into the project. This security and involvement are essential to assure a project's success. The employees become stakeholders and they are then committed to the project's success. There is simply no rational explanation for changing 4703(f). It is unacceptable and, Mr. Chairman, we urge that the current provision be retained. It has never been a problem.

AFGE also has concerns with other parts of title I of the bill, as my statement details, but of most serious concern is the fact that demonstration projects would not be required to adhere to statutorily mandated rights and remedies of employees or applicants for employment. For example, in this bill you are allowing agencies to waive whistleblowing protections at the same time that elsewhere in the bill you are insulating managers who take egregious reprisal actions. This is simply not conscionable. We can only assume that this was an unintended consequence.

Therefore, we recommend that the current non-waivable provisions be left unchanged by your bill and with respect to 4703 (c) and (f), if it is not broke, please, let us not have Congress fix it.

Our second major area of concern is with some of the title III provisions, performance management enhancement. As virtually everyone has said today, increasing the weight given to performance appraisals for retention purposes in a RIF places undue reliance on a system which has been documented for over a quarter of a century and has been found to be sorely lacking, inaccurate, too subjective and subject to favoritism and incompetent or lazy managers.

We all know that we are in an era of dramatic downsizing. Certainly the committee's soft landings provisions recognize this, and

we applaud them. Yet the committee's proposal would take an admittedly fundamentally flawed performance appraisal system and then increase the stake on it, and use it as a basis for adding additional service credit for RIF purposes.

In addition, you would be moving it from a flexible OPM regulation to a law that we cannot realistically be expected to have changed in the near future. No one disagrees that the best performers should be retained and all agree that anyone who does not perform the duties of a position should be dismissed. I think that is why many agencies have moved to a two-tiered evaluation system. Either you perform your job satisfactorily or you do not. And if you do not, after notice and a reasonable opportunity to improve, if you still do not, you should be removed. But this bill would result in a fixed statutory system in which employees under a two-tiered system who were truly outstanding performers in a pass/fail system will always fare far less well than just slightly above average performers under another system. This makes no sense.

Mr. Chairman, why not simply make the design of a performance appraisal system a necessary ingredient of demonstration projects? Systems could then be tried and validated rather than punishing employees now in the hope of forcing agencies some time down the road to design good systems. The point here is that the executives, the managers and the employees all know that the current system is flawed and you should not put greater credence to it.

Our third major concern is that the current statutory provision which gives arbitrators the authority to order an agency to initiate a disciplinary investigation against managers who have been found to be the cause of illegal reprisal actions is now being removed by this Congress or proposed for removal.

Those who object to the provision have yet to cite a single example of where a manager's rights have been affected. The courts have upheld the provision, the Department of Justice has upheld it and this committee's proposed revision sends exactly the wrong signal at exactly the wrong time to the American public which is raising a hue and cry for more Federal employee accountability.

It would in effect give high level lawbreakers a free ride. It tells managers that under this Congress, whistleblower retaliation can now be undertaken with impunity. How can you square the public's clear sentiment with elimination of this provision? It simply is not possible.

Mr. Chairman, our statement goes into greater detail about what we like and what we do not like.

On the EEO area, I would say that we simply do not see how you can get there without moving the funding and I think the transition and the funding problems are clearly in need of study. You cannot just impose it on the EEOC and leave the agencies that have been doing the function with all of the bucks.

We have previously given statements on streamlining and how to best accomplish this. I would refer you back to those statements. Some of the provisions in title II of your bill are fine, but then again, we have pointed out problems.

Thank you. If there are any questions?

Mr. MICA. I thank you for your testimony and thank each of our witnesses.

I will turn to Mrs. Morella for questions at this time.

Mrs. MORELLA. Thank you, Mr. Chairman.

And, again, I thank our witnesses, too, for the kind of substantive responses that we were looking for with regard to this legislation.

I want to thank you, Mr. Divine, for mentioning the 2 percent solution. I still think it makes a great deal of sense and I think it would move us forward significantly in terms of downsizing and people would be able to handle it. I also wish it had been included in the bill, but I am pleased that some soft landing proposals are included.

I want to thank you, Mr. Tobias, for mentioning the legislation that I introduced. It is included to extend additional optional life insurance for Federal retirees. This legislation will be modified due to concerns that were raised by OPM and it will instead provide all retirees with the option to buy additional optional life insurance if they pay the full cost, which should be, I think, probably very helpful.

But for all of you, again, I thank you. I know that you oppose the increased RIF credit for performance ratings and eliminating the mandatory PIP, but I ask you, what suggestions do you have to deal with poor performers and reward outstanding performers, particularly during the RIF process? It is a very difficult situation and I kind of know where you are coming from, but I do not really know what the answer is that would be satisfactory.

We could start any way, if you want to——

Mr. TOBIAS. Well, I think that in 1979, Congress believed that it had the silver bullet to fixing performance evaluations and it enacted this system with which we are saddled today, the elements and standards provision. And it has not worked. It was not the silver bullet. It was touted to be the silver bullet. It was not. But what I see occurring, particularly in conjunction with the Government Performance and Results Act, is more, first of all, agency consideration of what the results ought to be, measuring their results.

Once agencies get clear what it is they are supposed to be producing, it is much easier to align employees' behavior and performance consistent with those results.

Now, as the agencies move to comply with the Government Performance and Results Act, the evaluation systems, I believe, will fall into place over time and that is why I believe we ought to have demonstration projects, more demonstration projects, to allow for experimentation to allow for different approaches for this alignment to occur.

Now, that would make sense. I think that we are finally, I hope, out of the business of legislating a performance system for 2 million or less Federal employees. It has never worked. It did not work when OPM issued regulations that were across the Government and I do not think we can initiate performance fixing evaluation systems legislatively. We have to encourage demonstration projects, monitor the results. I think that is the solution to the problem.

Mr. ROTH. As I said in my statement, I think that we are spending a lot of time trying to distinguish between people where there may not be distinctions. If the problem is the poor performer and you have a system that states and documents that you are either

performing acceptably or not and you are not, then you do not have all of the weight of all the am I in the third level of performance moving into the fourth, or am I in the fourth to the fifth? You know, you really cut a lot of the nonsense out.

You set what is the basic minimal level of performance and if you are not there, you focus the resources on a short period of improvement. Because let's face it, the average Federal employee is 44 years old, I think has 16 or 17 years experience. Somehow that poor performer or alleged poor performer has been in the system an incredibly long time and why, I do not know.

I would say it goes back to Mr. Moyer's comment that a lot of managers are not very well trained, they do not want to take the action. No matter how far down you dummy a system, you can make it dumber and dumber, but if people are not going to do their basic functions as a manager, you are never going to make it dumb enough. And I do not think that should be your intent anyway, but I think you should have a pass/fail, have a very clearly distinguishable element. And if they do not make it, they are gone. They are gone.

Mr. DONNELLAN. I would like to agree with the last two gentlemen's comments. As I said in my testimony, we are committed to working to root out bad performance and if given an opportunity to respond, if they are not, then they should be separated for those people who cannot improve their performance or meet the standards.

Mrs. MORELLA. You know, it is interesting, sometimes you hear from the employees themselves who say that they would like to have that kind of weighted performance evaluation.

Mr. Divine.

Mr. DIVINE. I guess speaking from a little different perspective, because I have been a Federal employee for the last 30 years, I have also been a union official for the last 20 years, and while I have in those years seen poor performers, they are by far a very, very small portion of the work force.

Most of the Federal employees that I have known, and I have run across a lot of them in the last 30 years, are very dedicated, highly qualified people who want to come to work and do a good job.

Generally, when they do not do a good job it is because either one, they lack the proper tools to do it or the proper instructions. The biggest problem you have in the performance system today, whether it is a one-tier, two-tier or five-tier system, is the lack of communication. Supervisors are afraid to go to the employee and tell them bad news and employees have an inherent fear to go to that supervisor and discuss performance problems.

Ninety percent of the problems you have in performance is communications. I know. I have been there for 30 years. I have seen it. And you do not have the amount of time that Congress has spent dealing with poor performers, I have not seen those poor performers out there. We start looking at the productivity of the Federal work force. As productivity today, it has gotten smaller. I challenge you to point those poor performers out to where they are actually having a significant adverse impact on this Government.

Mrs. MORELLA. I realize where you are coming from.

I want to thank all of you very much.

Thank you very much, Mr. Chairman. I yield back.

Mr. MICA. I thank the gentlelady and recognize the gentleman from Virginia, Mr. Moran.

Mr. MORAN. Thank you, Mr. Chairman.

I was interested in a statistic I saw today that 78 percent, almost 80 percent of managers said that they had people who were poor performers working for them but only 18 percent said that they actually ever did anything about the poor performers, took action.

We may focus undue attention upon poor performers, but I think there needs to be some way for managers to reward the best performers, to provide incentives and to move people that are not performing that may perform better in another environment, with different chores, under a different manager.

I was struck today, there was a television station that was doing some interviewing and they brought up a couple of examples that are hard to address. One was this guy that has been not working for EPA for the last 5 years and he spends 20 or 30 hours a week as an expert witness on, I guess, the quality, indoor air quality, gets $300 an hour in addition to his Federal salary, but for 5 years he has not worked because he says that the building in which he was working had insufficient indoor air quality. Or not insufficient, it was harmful to him.

And they offered five other buildings, five different buildings that he could work in; none of them were satisfactory. And so he is home making $300 an hour and he is probably a pretty happy guy. He is not complaining about the situation. But we need to, even if it is an isolated example, which it is, it is not acceptable because that damages the credibility of the entire work force, that something like that situation can exist.

Another example that I was asked about, and I suspect John was asked the same thing today, these anecdotes,

Mr. MICA. The styrofoam man?

Mr. MORAN. Yes. The styrofoam cup guy that for the last, what, 3 years, every day he gets a cup of coffee because he does not have any other tasks to perform. He has been put in an office without a phone, without a computer, without anything to do, without a task to perform.

And so each day he puts together these styrofoam cups and makes arcs around his door and he is working on the second or third arc now but I imagine after 2 or 3 years you can accumulate a lot of styrofoam cups. He has done nothing, earns $110,000 a year because he does not get along with his boss and so his boss assigned him there.

Now, that may not amount to a lot in the scheme of things and they may be very isolated examples, but it is not surprising when a television station decides to do a series on the Federal work force that it is those two guys that are going to be highlighted. They make news.

Now, one would question whether they are even symptomatic of a larger problem, that may be a gross aberration, but the reality is that they exist, they are real, it happened. We have a system that allows it to happen, maybe they are getting up and leaving

now. No, I guess those probably do not look like that kind of people.

But, you know, when we talk about poor performance, this was not an example of poor performance, but it is an example of a situation where managers do not feel as though they can act within the constraints of the civil service system.

As far as I am concerned, in both cases, and they probably are both constituents, they should have been fired. I do not know whether they are doing a good job, they may very well be doing a good job. The manager may be at fault. But the manager is responsible for the use of Federal taxpayers' money and getting a job done.

We can hold the manager accountable for getting the job done and if they do not, then they did not use the best mix of people and they need to go out and get other people, whether they get along with them or not. The point is that they need to get the job done and that is what they need to be held accountable for.

These two people, I am sorry, if he has been given four other buildings with different air quality, then decide upon one of them and get to work or leave. And the same thing with the guy with the Public Health Service.

Now, that is my opinion. You may have different opinions, but I would like to elicit some comment here.

How would you have handled this question?

Mr. Roth, go ahead.

Mr. ROTH. Mr. Congressman, I am your constituent so I would be happy to explain that, actually. As far as styrofoam man, your bill makes the situation worse because there is now nothing he can do to his manager under your bill that would get him back to work.

I saw that television report, too. The man wants to go to work. I think everyone knows, for high-level managers, when there is some sort of dispute, if he wants to get fired real quick, he should become a union official, there is no problem. But when you have a high-level management official and there is a dispute at high levels of management, you are absolutely correct.

There is a turkey farm in every agency, this "turkey farm", where they put these people out to make their styrofoam cups and other things. Your bill does nothing to that.

Mr. MORAN. Well, how would we address styrofoam man?

Mr. TOBIAS. Well, I suggest that the focus of attention is often on the people you describe, styrofoam man or whoever else. They, I suggest to you, are a symptom of poor performance. The poor performance, the real poor performance, is the manager who does not deal with that problem.

The tools are available. There is no dispute that the tools are available. There is no dispute that the process that we have in place now, it is easier to fire a Federal employee than in almost every single State. There is no question about that. So the poor performance is not those people who are sitting in a room without work, it is in the performance of the manager who does not do his or her job. That is where the focus of attention is.

And I think that we miss the point by spending all of this time and all of this effort on changing a process which is easy to use if it is used.

Mr. MORAN. Well, that is interesting. I do think there is some culpability on indoor air quality man and styrofoam man in that they did not have enough pride just to leave and do something productive with their skills and their lives. But I agree with you, it is the manager that is at fault. And so you would agree they should have been fired.

Mr. TOBIAS. The facts on—I agree that in this Government there are people who do not perform and who ought to be fired. And I also believe that the processes that are currently in place make it very easy to fire someone.

And I think that if you look at the record in the Merit Systems Protection Board of those who appeal their actions, what you see is about an 82 or 83 percent sustained rate of those who appeal and only a small portion appeal. So it can be done when a manager makes the decision to do it, it works, people are eliminated. So we have all of this focus of attention on the wrong people, in my view.

Mr. MORAN. Well, I do not disagree. As Chairman Mica said, we are trying to get some direction here. I want to know what could we do that would make the situation better?

Mr. Roth, you say this bill exacerbates this situation.

Mr. ROTH. Yes, because you are saying, well, we are going to add so-called due process rights to managers who are found in an arbitration case to be responsible and who now under the 1993 Special Counsel Reauthorization Act, that arbitrator has the right to direct the agency to order a disciplinary investigation of that supervisor. So I do not know if someone who makes $110,000 for the Federal Government could possibly be in one of our bargaining units, but if they were——

Mr. TOBIAS. Not in mine.

Mr. ROTH. Not in ours, I mean, I would like to find out who styrofoam man is. Our people have the right under current law to go to arbitration and say, listen, they took away all my duties because I am a whistleblower and the arbitrator can make a finding that you are absolutely right.

This man, you took away all his duties, I am going to order the agency to initiate a disciplinary process against styrofoam man's supervisor who did this. And then that person, who is the person who should be gone, if that is how they manage the Federal Government and my taxpayer moneys, I want them gone. And that would be a simple matter. That would take 60 days at the most. But under your bill, that is gone. That remedy is gone.

Mr. MORAN. Well, this bill is not set in concrete. This is an evolving document.

Any other comments on this? Do you guys want to jump in here?

Mr. ROTH. Well, you know, the other thing is, Mr. Moran, if the manager, styrofoam man's manager, even brought the action, I think the statistics are that 80 percent of the people do not appeal, so he might even have—it is better than even flipping a coin as far as whether styrofoam man would appeal. It is 80 percent of the cases just go, the person is gone, they do not even fight them. That is a pretty good rate.

Mr. MORAN. OK. I have your testimony. I had to go out to a meeting that had been set up a long time ago, so I missed your testimony. I have a suspicion some of the points that you might have

emphasized, though, but I do not want you to have to repeat yourselves.

I am OK, Mr. Chairman, if you need to go on to the next man.

Mr. MICA. I do not have any questions. As I said, I came to listen today.

This is the part in the ceremony where the minister or the presiding official says speak now or forever hold your peace.

Do you have any additional comments, Mr. Divine?

Mr. DIVINE. No, thank you, Mr. Chairman.

Mr. MICA. Recommendations, Mr. Donnellan?

Mr. DONNELLAN. No, thank you, Mr. Chairman.

Mr. MICA. Mr. Tobias?

Mr. TOBIAS. We will let the record stand. Thank you very much.

Mr. MICA. And, Mr. Roth?

Mr. ROTH. Just those opening remarks about general counsels. I feel if they are in the Congressional Record—[laughter.]

Mr. MICA. They are permanently emblazoned, along with the comments of the previous witness that talked about the difficulty of making changes in the Federal Government.

Mr. ROTH. I know my national president will enjoy reading them.

Mr. MICA. And tell him I look forward also to your proposed amendment to deal with the turkey farm situation.

There being no further business to come before the subcommittee this afternoon, this meeting is adjourned.

[Whereupon, at 3:30 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

Coalition for Effective Change

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July 24, 1996

The Honorable John Mica
Chairman, Subcommittee on the Civil Service
Committee on Government Reform and Oversight
B-371C Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Coalition for Effective Change, 29 federal managerial, executive and professional associations, has been following with interest H.R. 3841 - the Omnibus Civil Service Reform Act of 1996. We thank the Committee for holding hearings on the bill and for their efforts in support of federal employees.

The Coalition strongly supports many of the included titles - particularly Title IV, dealing with the Thrift Savings improvements and Title VI, the "soft landings" section. We also would support Title V if it insured that the employees who are reassigned on nonreimbursable details only do so voluntarily. Title VII, miscellaneous provisions, is also supported by our associations, especially the lability insurance provisions.

Because the Coalition has taken no positions on other titles of the act, we have no comments at this time. We believe that changes are needed in the other areas and do look forward to working with the Committee on improvements to demonstration projects, enhancing performance management and simplifying the appeals processes.

The Coalition thanks you for your attention to our interests. Please call on us if we can help you in your deliberations.

Sincerely,

Rosslyn S. Kleeman
Chair

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STATEMENT OF
DONALD E. SEATTER, NCSSMA PRESIDENT
JULY 23, 1996

ON. H.R. 3841
THE OMNIBUS CIVIL SERVICE REFORM ACT OF 1996

FOR THE RECORD OF THE 7/16/96 HEARING
CIVIL SERVICE SUBCOMMITTEE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
U.S. HOUSE OF REPRESENTATIVES

The National Council of Social Security Management Associations (NCSSMA) represents 3200 supervisors and managers in over 1300 Social Security field offices and teleservice centers in the U.S. We are among the "beyond the beltway" federal employees who directly serve and are immediately accountable to the public across the country each day, by telephone and in person. We chose direct public service as a career, and we take very seriously our responsbilities as stewards of the public trust and public monies.

Every modification in civil service policy, every issue regarding federal employee duties, pay, rights, and benefits, every impact on federal employee morale, affects our ability to manage our offices and serve the public. We strongly favor changes which assist federal managers, especially during this time of downsizing and streamlining, to become more innovative and willing to take risks and emulate private sector "best practices" when they are appropriate for a public service mission. We especially desire the flexibility to adapt our offices and practices across the country in keeping with local clientele, culture and customs in order to maximize our effectiveness and efficiency.

We therefore appreciate this opportunity to contribute our views on H.R. 3841, the Omnibus Civil Service Reform Act of 1996.

Having experienced the uncertainties, loss of employees and staffing imbalances attendant to dramatic downsizing in SSA during the 1980s -- yet still facing further staff reductions under current governmentwide initiatives -- our members are acutely aware of the need to assist employees as they transfer to new responsibilities or leave the federal government. We strongly support the so-called "soft landing" provisions in H.R. 3841 which allow RIFed employees to maintain their FEGLI coverage, waive the five-year minimum for continuation of health insurance under both RIF and voluntary separation, and extend agency payment of the government's portion of premium for eighteen months. We are encouraged to see provisions making statutory the requirement that agencies set up priority placement and outplacement programs which facilitate inter-agency transfers and and which permit agencies to pay retraining and relocation costs for displaced employees trying to move into private sector jobs.

We urge Congress, however, to re-consider the value of buy-out authority for federal agencies and add that authority to H.R. 3841. The buy-out program last year was a valuable tool used by SSA to meet staff reduction goals in a humane and cost-efficient way, and we believe buy-outs should once again be offered.

NCSSMA also strongly supports the proposed modifications to Thrift Plan rules which will provide contributors with additional investment options, allow contributions to rise to the IRS cap for both CSRS and FERS employees, and liberalize borrowing authority.

The following comments are offered in the hope that we can constructively contribute to discussions concerning the more controversial proposals contained in H.R. 3841.

1. Demonstration Projects

NCSSMA fully supports the goals of increased flexibility, creativity and innovation intended to allow federal agencies to identify ways to better achieve their public service missions. Properly conducted demonstration projects allow the government to try and then to evaluate new ideas rather than implement them, unproven, throughtout an agency or large subcomponent. If the current limits on size and number of demonstration projects create an impediment to their effective use, we support the expansion of this authority, as long as adequate safeguards and oversight mechanisms are in place and agencies are held accountable for the results.

We urge maintenance of protections that have evolved over the years, for good reason, against abuse and politicization in the civil service. Congress wisely required adherence to merit principles and non-abridgement of employee rights within the demonstration project authority it provided.

While it has been 18 years since the Civil Service Reform Act authorized demonstration projects under the current restrictions, and while workplaces and human resource management have changed significantly during that time, the original intent of demonstration projects remains timely: "to improve personnel management in the federal government" and "to test theories, methods and technolgies" against controls, so that results can be measured or otherwise evaluated. (P.L. 95-454, Legislative History, pp. 92-95).

* To have any value, demonstration projects must be contained in overall size and number in such a way as to ensure an adequate "control" against which to measure. Each agency must be careful to maintain a sufficient workforce of regular civil service employees engaged in comparable activities to allow measurement and evaluation of the experimental programs.

* Before expanding demonstration authority, a measure of the success of those conducted to date is needed. Under most demonstration projects, have systems, procedures and outcomes been merely "different" from the control organizations, or do we have evidence that they been "better"? Which demonstration projects failed, and why? How would removing existing restrictions be expected to fix the problems?

* Congress and OPM have over the years feared agency abuse of discretion and therefore intentionally built in certain safeguards. It is going too far to now remove all safeguards -- be they uniformity in federal employee benefits, such as the rules governing annual and sick leave, or assurances that federal agencies will abide by the laws of the land for all employers, such as the rules regarding affirmative action.

* One critical key to success in any demonstration project would certainly be the degree to which those affected support it and believe in the positive possibilities it offers. The involvement of all employees and their representatives at all stages of demonstration project development and implementation is therefore essential. Agencies should be required to involve and work with affected employees before any project is undertaken.

* Finally, the larger a demonstration project, the greater the taxpayer investment required to fund it. If Congress increases the size and number of projects, it becomes more, rather than less, important to maximize "sunshine" on government activity and provide accountablity to the pubic. The requirement for public hearings should therefore be maintained.

2. Simplified Appeals

Although the details of this proposal are not currently available, we understand the Government Reform Committee is considering changes in the handling of "mixed cases" and a requirement that agencies utilize Alternative Dispute Resolution (ADR).

NCSSMA supports simplification of the handling of "mixed cases" (labor disputes which are also discrimination disputes). Requiring an employee to pursue his or her appeal by selecting either the Merit System Protection Board or the Equal Employment Opportunity Commission and then remaining in that forum to the conclusion of the case simultaneously simplifies the process, speeds resolution, and protects the employee's right to select the appeal avenue they believe most appropriate.

Even more promising, however, for speeding and improving the process for all cases, possibly greatly reducing the number which reach the appeal stage, is the mandate that agencies use ADR as early as possible in complaint proceedings. ADR, whether it be the more formal mediation or less formal approaches such as facilitation or interest-based bargaining, focuses on what each side's needs are and seeks to reach a compromise. It offers great hope for streamlining the process, saving employees' and managers' time, and saving the federal government significant costs (three years ago, the average cost to the government was approximately $62,000 to process an EEO claim through the appeals process). ADR should be used at the beginning of the process, as soon as a complaint is made, rather than (as now happens at the Social Security Administration) as a last resort effort to resolve the matter before going to arbitration. The requirement of ninety days to utilize ADR before seeking an administrative forum is reasonable.

On a cautionary note, ADR methods are largely untried and unproven, and it would be advisable to sunset this requirement after a period of time (perhaps five years) to ensure adequate evaluation prior to making it permanent.

Finally, we question the proposal to eliminate the requirement for the inclusion of binding arbitration among negotiated grievance procedures. When other avenues fail, binding arbitration should remain as a means of bringing the matter to final resolution.

3. Enhanced Performance Management

NCSSMA agrees that it is highly desirable to retain the best employees during government downsizing and to create incentives for employees to work more productively. We note, however, the Civil Service Subcommittees' acknowledgement that current performance management systems in the federal government are largely "broken."

NCSSMA opposes attaching greater rewards, here in the form of additional RIF credit years, to employees on the basis of summary ratings which in too many cases do not, or are not perceived to, measure performance actually and acurately. We understand the expressed hope that, indirectly, better performance appraisal systems would result when affected employees effectively pressured agencies for more robust ratings systems "rather than take the risks associated with systems that provide no advantage to better performance." This hope is unfortunately neither reasonable nor realistic. First, employees are not empowered to effect such change; and, second, after years of trial and error with performance evaluation systems, none has delivered the desired result.

The cardinal rule regarding performance appraisal systems is that they change by design -- about every four to five years in large, private sector companies -- because they do not measure what is intended. Subjectivity and too many spurious variables creep in to render the system invalid. Credit years for RIFs is unequivocally such an unintended variable. Just as the distribution of award money became the driving force -- rather than performance -- in ratings distribution under the failed Performance Management and Recognition System (PMRS) for managers (which followed the failed Merit Pay system), political pressures -- rather than performance -- would threaten any performance appraisal system which distributed additional RIF credit years as this bill proposes.

If the goal is a performance management system which better measures and rewards performance, and if employee input is intended to be a force in that development, a direct approach is needed: a statutory requirement that agencies involve, in all stages of development of a new system, both the managers who will be responsible for implementation and the employees who will be covered. The law should also mandate training programs for performance management rating and reviewing officals and training in communication skills both for managers conducting the appraisals and for those being appraised. (These were among the recommendations made by the PMRS Review Committee five years ago after a six-month study of government and private sector performance appraisal systems in an effort to reform that now-defunct system; they are no less applicable today.)

Better performance management systems may result from employee involvement, training and improved communication by and among employees, managers, and agency officials regarding performance measurement, planning and evaluation. Better systems will not result from giving greater weight to ratings under flawed systems.

OPM encouraged employee involvement by agencies when it liberalized regulations which now permit agencies to utilize systems with as few as two summary ratings levels. The so-called

"pass-fail" system appears to be ignored by the current proposal to attach additional RIF credit years for "Outstanding" and "Exceeds Fully Successful" employees. Employees under such systems would be egregiously disadvantaged in comparison to highly rated employees under five-tier systems. If the Subcommittee intends this omission as a criticism of two-tier ratings systems, we must point out that these are the product of multi-tier systems that did not work, were unduly complex and time consuming, required often artifical distinctions among successfully-performing employees, and created severe morale problems for employees at all ratings levels.

Finally, the proposal to eliminate the requirement for Performance Improvement Plans (PIPs) for employees with unsatisfactory performance is certainly well intentioned. Ideally, at least initially, the process should not be threatening to the employee or be a prelude to adverse action (as is a PIP). At SSA, we are currently trying a new and promising informal first step procedure (aimed at "performance enhancement") prior to turning to the formality of a Performance Improvement Plan.

NCSSMA would oppose any proposal which did not guarantee an employee a fair and reasonable opportunity to improve unacceptable performance. Whether that opportunity is provided through the development of a PIP, or by a process with a different name, the important thing is that there be a procedure which ensures that the supervisor explains and the employee understands why he or she is failing and what specifically he or she must do to improve. The required improvement may be a quantitative, easily measurable change (such as increased number of work products processed in a day) or a qualitative, behavioral change (courtesy to customers) as long as the employee understands both what is needed and the period of time in which the specified improvement must be attained.

The employee must also understand that once the improved level of performance is achieved, it must be maintained if they are to keep their job for the duration of the rating period. NCSSMA fully supports the idea that an employee must not only improve, but must maintain an acceptable level of performance, in order to remain in his or her position. The requirement for maintenance of improved performance is the missing factor in the current system, under which an employee can indefinitely yo-yo on and off of PIPs.

NCSSMA appreciates this opportunity to express our views regarding H.R. 3841. We welcome any opportunity to clarify or enlarge upon our ideas in the interest of civil service improvements and more effective services to the American public.

PUBLIC EMPLOYEE DEPARTMENT
AFL-CIO

AL BILIK, *President*
JOHN F. LEYDEN, *Secretary-Treasurer*

Executive Vice Presidents

Richard W. Cordtz
Gerald W. McEntee
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Vincent R. Sombrotto
John N. Sturdivant

July 17, 1996

The Honorable John L. Mica
Chairman
Subcommittee on Civil Service
Committee on Government Reform & Oversight
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Public Employee Department (PED), AFL-CIO, which is made up of 34 national unions representing nearly 4.5 million government employees at all levels of government including approximately 900,000 non-postal federal employees, submits the following comments with regard to the Omnibus Civil Service Reform Bill of 1996 currently being considered by the Subcommittee on Civil Service.

While the legislation incorporates several positive provisions, particularly those expanding employees' options and participation in the Thrift Savings Plan (TSP) and the "soft landing" provisions seeking to assist those federal employees that will lose their jobs during this era of government downsizing; the legislation also includes several provisions to which we must object. The PED, which serves as a member of the National Partnership Council (NPC), and its federal affiliates have been deeply involved in this government's reinvention efforts, and we see those provisions as running counter to the basic principles that must be adhered to in order to achieve the high-performance workplace our nation's taxpayers deserve. The legislation under consideration fails on this count by incorporating proposals that would diminish accountability, discourage employee involvement in decision-making, and run counter to merit principles.

The PED recognizes the need for changes in the current civil service system in order to achieve a high-performance workplace that would assure accountability for accomplishing agency missions and eliminate duplicative rights, obligations and remedies. However, the key to such reform will be the support of all stakeholders, that is, the agencies, unions, employees, managers and the public. As witnessed by the testimony heard at the Subcommittee's July 16 hearings, the bill as drafted also fails on this count.

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The provisions which we find most objectionable include

- **Demonstration Projects.** The legislation essentially prohibits any real employee involvement in the design of new personnel systems under demonstration projects by permitting only an inadequate 30 days' notice to affected employees without requiring any input on their part. At the same time, the bill allows agencies to simply cancel collective bargaining agreements rolled-over or entered into after enactment, closing off represented employees' currently permitted and real involvement in the design of demonstration projects under which they will work The sanctity of a contract has been one of this nation's basic legal principles, which the bill seems to cavalierly reject in one seven-line paragraph

- **Performance Management Enhancement.** While the current performance appraisal system has been universally discredited since its ratings are entirely subjective rather than providing objective measurement of performance, the bill amazingly seeks to give significantly added weight to those ratings in a RIF. There can be no rationale for this provision One could surmise that the real goal here is not improvement of the current performance system, but rather to remove more costly long-term employees to help meet agency budget constraints The reasonable and equitable way to attain that goal is through buy-outs and other incentives Using the discredited performance appraisal system to further expedite the removal of long-term employees is simply a heartless shell game

Title III also includes a provision described as protecting managers' due process rights under negotiated grievance procedures Currently, arbitrators have the authority to direct agencies to pursue disciplinary action against managers deemed directly responsible for prohibited personnel practices The legislation would eliminate current law on this count turning the principle of accountability on its head and leaving managers free of any accountability for illegal personnel actions

Finally, we must object to the bill's repealing appeal rights in with-in grade increase denials, particularly if that repeal includes unions' ability to grieve such denials. The language should clarify that this right to grieve such denials is maintained

- **Civil Rights Complaints.** In the area of civil rights complaints, the legislation simply converts federal sector civil rights complaints processing to the private sector model This proposal will only diminish private sector civil rights enforcement and eliminate safeguards against federal sector discrimination

The PED also has concerns regarding a number of other of the legislation's proposals, including those dealing with the size of demonstration projects, the waiver of current non-waivable restrictions on demonstration projects, including hiring, retirement, health insurance, and leave rights, streamlining the appeals process, elimination of mandatory Performance

Improvement Plans; reimbursement of professional liability insurance costs, elimination of Sunday premium pay for time not worked, and retraining incentives, relocation reimbursements and educational assistance. We refer the Subcommittee to the testimony and statements of our affiliates, the American Federation of Government Employees (AFGE) and the National Association of Government Employees (NAGE) as encompassing our views on these issues

We request that this letter be included in the Subcommittee's hearing record and thank the Subcommittee for consideration of our views on behalf of the federal employees represented by our affiliated unions.

Respectfully,

John F. Leyden

John F Leyden
Secretary-Treasurer

cc: Subcommittee on Civil Service Members

5704 Mossrock Dr.
Rockville, MD. 20852
July 10, 1996

Mr. Edward Lynch
Civil Service Subcommittee
House of Representatives

Dear Mr. Lynch:

Thank you for the phone call today. I regret the fact that I will be out of town during both the July 12 staff briefing and the hearing on July 16. As Executive Director of the President's Personnel Management Project on which the Civil Service Reform Act of 1978 was based, I have a very strong interest in any proposed additional reform legislation. Since I have not seen the proposed legislation you mentioned, I cannot comment on its specific provisions, but I do have several comments I would appreciate having forwarded to the members of the Subcommittee:

- **Demonstration Projects.** In principle, I strongly support legislation which facilitates wider use of demonstration projects, providing there is a credible assessment of the demonstration experience and their successful extrapolation for wider use. In recommending such projects as part of the 1978 Reform, I did not support the restrictive use of such projects which resulted. In my view, the key is the quality and independence of the review of a project before extending its application. I am not suggesting a review by auditors, but rather an independent review by professional men and women with government experience, but also including some representation from corporate America.

- **Fraudulent health care providers.** Although I have not seen the specific language, in principle I certainly support the OPM intent to disbar health care providers found to have engaged in fraudulent practices.

- **Outplacement.** Again, I have not seen the proposed language, but I agree with the need to authorize more tools to help in the outplacement of personnel subject to RIFs. Earlier I had the responsibility for closing an agency I headed, the Community Services Administration. I had the cooperation of your predecessor Committee, and I drew upon every program and management technique that was in existence to ease the hardship that the RIFs imposed upon career men and women, some of whom had spent their professional life serving the public with distinction. But the legal tools available to me were woefully inadequate. The current system must be improved.

- **Oversight of Training.** I have no idea what legislation people might be considering in this area, but I will say that the problem is not nearly so much the need for legislation as it is the lack of OPM and NPR leadership in this area. There has rarely been such a need for training as exists today with the government-wide NPR effort to (a) change the culture of the federal workforce, and (b) the unprecedented amount of change in processes and roles being attempted under NPR. Further, the smaller the workforce, the more vital it is that those employees who remain are highly qualified and trained to perform as nearly at their potential as possible.

  Yet OPM and many of the non-military agencies seem to have moved in precisely the opposite direction. The OPM performance with respect to its leadership role, in particular, is most disappointing.

- **NPR Impact on Public Service.** There is considerable concern that a number of the NPR objectives that have earned widespread support are in danger of being undermined by poor implementation. In my judgment, this is especially true in the important area of human resources which is the foundation of any successful organization. Enclosed is an article I published a few months ago on the subject. Some of us are convinced the intent, if not the letter of the law, is increasingly vulnerable to violation. I would urge the Subcommittee to initiate an investigation into this situation while there is still time to avoid widespread problems and possible scandal.

I hope these few comments are of some help. Please let me know if I can be of further assistance. It is a subject of great importance.

Sincerely,

Dwight Ink

Enclosure

COMMENTARY

Does Reinventing Government Have an Achilles Heel?

Dwight Ink

Well-intentioned efforts are likely to have some very costly long-term consequences that could offset or even undermine the gains.

We are witnessing an exciting period in which both the White House and Congress are striving to reinvent government, albeit often with a different agenda. It is the purpose of this article to suggest that these well intentioned efforts are likely to have some very costly long-term consequences that could offset or even undermine the gains. When President Clinton announced his intention to "reinvent" government, and the National Performance Review (NPR) took shape, a few strongly criticized the recommendations as being a mishmash with no underlying theory or cohesiveness. True enough, but pragmatists saw in the NPR a number of things that sounded pretty good, theory or no theory.

Cutting red tape is a perennial favorite, even though the red tape seems to have a remarkable ability to regenerate over time. Cutting costs, providing more flexibility to agencies, empowering employees, and other NPR objectives were welcome objectives. Most of us cheered the NPR push for more experimentation, more pilot operations, the goal of breaking free of systems which were overburdened with procedures, and the promise of greater support for initiative and creativity

Early Concerns

Despite the popularity of a majority of the NPR concepts, there were elements of the NPR that were troubling. The promised NPR savings of $108 billion was highly suspect. Considerable reliance appeared to be placed on local government examples used in the Osborne-Gaebler book *Reinventing Government* which were often of questionable application to the national government. I had doubts that the appearance of substituting the goal of satisfying the "customer" for the broader concept of serving the "citizen" was a wise change. And there seemed to be a penchant for change just for the sake of change.

Careful observers also became uneasy about how career managers were used, and at times ignored, in developing the NPR. Not infrequently, experienced men and women were tapped for duty on the NPR redesign teams, but reassigned to areas entirely different from those with which they were familiar and then given very little time to understand the new territory they were to reinvent. Surprisingly, very little participation of field personnel was evident, and designs were dominated more by the Washington perspective than one would have expected.

Mixed with a positive outreach to innovative persons who had led improvements in individual administrative processes was an unfortunate lack of individuals experienced in broad reforms that extended beyond departmental lines. And, in a few instances, agency personnel most knowledgeable in the subject matter were prohibited from even talking to the NPR teams. Although the Grace Commission of the 1980s suffered greatly from its failure to take advantage of career knowhow, several earlier reforms utilized career managers more effectively and were more open than the NPR.

Size of Government

The emphasis on reducing the number of employees by a precise amount with no credible rationale for the number has also plagued the credibility of the NPR from the outset. It is unfortunate that the Clinton administration, as well as many Republicans in Congress, equate the number of federal employees with the size of government. This is untrue, and failure to understand this misconception is handicapping the reinvention effort. As pointed out by Paul Light in his recent book, *Thickening Government*, the number of federal employees has remained virtually constant over 30 years, but the number of tax-supported contract employees has increased substantially (a fact seemingly ignored in the NPR), and the real expenditures of government have increased dramatically through new and expanded programs.

Dwight Ink *has served in both career and political government positions from GS-7 to Executive Level II. He has been president of the American Society for Public Administration and of the Institute for Public Administration.*

Our preoccupation with the one non-expanding element of the governmental burden on taxpayers reflects a superficial approach at both ends of Pennsylvania Avenue in addressing the size of government. Curiously, the feds were encouraged to learn from the Osborne-Gaebler local government examples, although the size of the local government workforce has mushroomed over the years, in sharp contrast to the stable federal workforce. It is also something of a mystery why cutting federal employees saves money, whereas contracting out is often treated as cost free.

Rational vs Irrational Reductions

Perhaps most puzzling was the fact that no serious attention was given to the *role* of the federal government, and *what* its agencies should be doing, until two years after proclaiming precisely how many employees were *not* required to manage those agencies. Still, much as I deplore the cavalier manner in which the 252,000 cut (later 272,900) seems to have been established, I nonetheless believe the objective of reducing the federal workforce was valid. However, it should have been presented honestly as the budget measure it really was, and the number linked directly to changes in organization roles and missions, the streamlining of procedures, and reduction in program responsibilities. I believe that the number of employees can be cut, but *only if* done in the right places and in the right way. We have permitted the proliferation of too many agencies, for example, a development which has led to fragmentation that strengthens the leverage of special interest groups and does not serve the public well.

I suggest that we now draw upon successful *federal government* experience of the past, as well as build on NPR steps which prove to be successful, in exploring more basic restructuring than the NPR has considered. Because Mr. Gore insisted that government was broken and had little to offer in the way of useful experience, scant NPR attention has been given thus far to what we have learned from our highly flexible public corporations, streamlined agencies that functioned effectively in the absence of complex procurement and personnel regulations, and dramatic reforms in operations that have served well in time of disaster rebuilding. When protected from politicization of the career service, these examples offer the potential for fundamental improvement in government at great cost savings.

My quarrel, therefore, is not with reducing the size of the workforce, but in what I regard as the irresponsible way in which much of it is being done. Is it too much to ask that we decide what workload our government workers are asked to handle *before* determining how many are needed to manage that workload responsibly?

What About Reducing Political Employees?

One area of further reductions that should not await exploration of more fundamental changes in structure and mission is that of our overabundance of political appointees below the level of assistant secretary, especially Schedule C appointees. Special assistant positions are particularly in need of review. I find it disturbing that, while the NPR has been denigrating the importance of career managers, and leaving them out of the National Partnership Council, the NPR is comfortable with the creeping growth of political patronage.

Although their numbers are small as a percentage of the total workforce, these lower-level political appointees do a surprising amount of damage.

- Their quality and knowledge of the subject matter are very uneven, and on the whole, not very good. White House personnel offices have neither the capacity nor the motivation to do much screening of quality, focusing instead more heavily on measuring the campaign activity of supplicants for patronage jobs and processing their financial and conflict of interest statements.
- Political appointees are short-term, leaving after an average of only 20 months, about the point at which they have learned their job. This also means that their interest is short-term (often focused on using the job as a stepping stone for higher private sector pay) with little sense of responsibility or accountability for the later consequences of their actions.
- They tend to be caught up in the view that their predecessors did not know how to manage the organization they have just joined, and that its programs have to be quickly changed, or at least given new labels and objectives, pursuant to some vision of the new election "mandate." This lack of continuity is costly and creates considerable difficulties for the government's "customers," many of whom have inadequate resources to be constantly revising their organizations and systems to accommodate the unpredictable federal government and the profusion of ever-changing requirements with which local governments and businesses are expected to cope.
- Their principal loyalty is often to an interest group or a political figure other than the president.

If we insist on the further cutting of career staff before addressing the program responsibilities and requirements placed on the federal employee, if we continue to delegate without much oversight, and we persist with our current denigration of federal managers and the importance of professionalism in the public service, we will be in serious trouble. Under these circumstances, significant additional downsizing and decentralization will likely spawn government waste and abuse, as well as poor delivery of those services that are retained as government responsibilities.

The Question of NPR Leadership

In too many instances, the machinery set up to handle the president's effort to reinvent government has been comparatively amateurish. An important exception was the designation of the vice president to lead the effort. Mr. Gore's sustained devotion to a cause of improving management which carries few political rewards, is an exception that deserves praise.

This master stroke of the president would have been more productive, however, had Mr. Gore been in a position to draw upon a strengthened professional management staff in OMB. Unfortunately, at the time when this OMB management resource was most needed, it lacked the necessary capacity. Instead, a competing NPR staff was established in the vice president's office, leaving agencies somewhat caught between the two. The subsequent dispersal of much of the OMB management staff has left the government with little institutionalized staff to give coordinated leadership to the implementation of the NPR or other management initiatives of the future, and has contributed to growing support for an Office of Federal Management in the Executive Office of the President.

The capacity deficiency has been alleviated in a very narrow way through the appointment of John Koskinen as OMB deputy for management. He is a very able individual who has, with the backing of Director Alice Rivlin, demonstrated effective personal leadership capability despite severe organizational handicaps.

Did NPR Forget Human Resources?

But the most serious gap between NPR promise and delivery has been in the area of human resource development and management. Anyone who has managed organizations knows full well that no amount of innovative change in structure or systems can substitute for qualified personnel in effective operations. Without capable and well-trained people, policies cannot be implemented and programs don't work. These points are so basic that one might think an effort to reinvent government and change its culture would give the highest priority to enhancing the quality of the workforce and providing an environment in which men and women were protected from political manipulation. Wasn't that the spirit of the NPR in empowering public servants? Instead, we find increasing indications of the opposite occurring.

Training Sharply Reduced

While the NPR goal called for massive operational changes and stressed the need for a new culture, inept implementation has reversed the initial NPR objective of increasing the training needed for employees to adapt to the new culture and to function effectively in different assignments. A person should not be expected to operate or manage an entirely new process without having an opportunity to learn that new process. The NPR call for more contracting out, for example, requires people to shift from operating an activity to administering a contract through which the activity is conducted, a task involving very different skills for which people must first be trained to avoid high costs and possible corruption.

Instead of trying to meet the greatly increased need for equipping the workforce to meet the new demands generated by reinventing government, training has been sharply reduced, and the integrated career development and training

Recognition Week Reaches 10th Anniversary

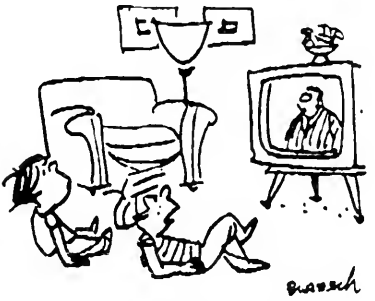
May 6-12 will mark the 10th anniversary of the first Public Service Recognition Week (PSRW). PSRW was launched originally in four cities as a means of educating Americans about the breadth of government services and quality of public employees, and as a time to honor those who serve as public employees. With growing participation by state and local governments, employees in more than 1,200 cities now plan activities during the first Monday through Sunday in May.

What are you doing for Public Service Recognition Week? It's not too early to begin planning now. PSRW is an important opportunity for all of us to help restore public employees to a place of respect. With budgets shrinking, it is vital that our citizens be educated about what government programs do and how well they do it. PSRW is also the perfect opportunity to reach out to the media with stories about the positive side of government and public employees. Public Employees Roundtable (PER) has developed a media guide that includes useful tips on year-round media outreach.

PER also has several other tools to help you plan your PSRW activities.

- A directory of PSRW points of contact organized by state. Request a copy of the pages for your state and coordinate your activities with other public employees in your area who are already active PSRW participants.
- *How to Celebrate Public Service Recognition Week*, PER's comprehensive guide to planning and implementing your ideas.
- *Building Bridges with the Community*, a guide to giving speeches, visiting schools, and doing other community outreach.
- "How to Organize a Mall Event," a free 10-minute video which provides a step-by-step guide to organizing exhibits for the public.

The PER staff is always glad to help you prepare for Public Service Recognition Week. Whatever your needs, you can reach them at 202/927-5000. Start planning today!



"Abraham Lincoln wouldn't have let us get into the National Debt mess!"

effort put together by former OPM Director Constance Newman has been broken up. Most of the OPM program training has been sole-sourced to a so-called private contractor with little or no information available to the public as to what, if any, careful analysis has been made of comparative costs or quality of training. The Federal Executive Institute no longer has a full-time director, and the valuable presidential management intern program is struggling to exist. Other highly-regarded reimbursable training programs have been struggling to survive outside OPM.

Decentralization Poorly Planned

Decentralization has also been poorly planned. The NPR recommended delegating a number of personnel functions to the agencies to reduce centralized red tape and permit agencies to better tailor personnel management to their particular needs. This decentralization objective received widespread support and, in theory, was consistent with the Civil Service Reform Act of 1978. Instead of moving from "rowing to steering," as contemplated by the 1978 statute and NPR, however, the OPM has moved from rowing to drifting. OPM seems to be paying little more than lip service to its leadership responsibilities under the law. It is not setting an example for effective human resource management.

Numerous earlier decentralization efforts in the government were short-lived because of implementation weaknesses. Frequently, highly desirable delegations to agencies, or from agency headquarters to the field, have been gradually reversed as confusion, blurred accountability, and scandals have led to recentralization. It would have been advantageous for NPR to adopt several decentralization principles that have stood the test of time.

- *Capacity to Perform.* There needs to be an assurance that the organization receiving the delegations has the capacity to perform the delegated responsibilities effectively and protect the merit principles set forth in the law.
- *Effective Oversight.* Since the delegating agency remains accountable for those authorities which have been delegated, there needs to be an effective oversight program to monitor performance of the activities delegated.
- *Technical Assistance Available.* The central oversight agency needs to retain the capacity to provide technical assistance to agencies needing to strengthen their capacity to carry out the responsibilities delegated to them.

Unfortunately, there is little evidence that OPM now has the leadership to meet the critical responsibilities that flow from these principles.

Conclusion

In summary, I believe that a majority of the original NPR concepts are worthwhile and still deserve strong support, even without the benefit of a unifying theme or set of principles. But the governmentwide approach to implementation, with a few exceptions, has been organized and conducted quite poorly. Some agencies believe they have risen above this handicap and are using the freedom provided by the NPR to undertake positive changes that cut staff and costs while improving performance. Perhaps more of these advances than are now apparent will emerge as the work of the reinvention laboratories matures and a number of agencies regroup from the confusion of attempting more change than their managerial capacity has been able to digest.

I would hazard a guess that in the long run, those agencies which are protected from political interference in management activities and have a tradition of good management, such as the Department of Defense, will use the NPR to advantage. However, less fortunate agencies, those more susceptible to political pressures, in the long run may well encounter a series of shortcomings born of NPR, particularly the abuse of the very management flexibilities most of us have long advocated. I say this in large part because of a view that, contrary to early NPR statements, the human resource component of reinventing government—its most basic building block—has become an orphan under stress and without effective leadership.

While the administration should be commended for launching the ambitious NPR effort to improve government, in the end the number of cases of waste, abuse, and inequities in service delivery resulting from poor NPR implementation may well lead to recentralization in a number of areas and the rebuilding of the red tape NPR is working so hard to eliminate. In view of the downsized General Accounting Office and a passive Merit Systems Protection Board, I fear that the extent of the NPR weaknesses will not be detected until much damage has occurred. It should be obvious that the more the size of the government workforce is reduced, the more critical it is to foster a highly qualified public service. Failure to recognize this principle could become the Achilles heel of NPR. ★

SENIOR EXECUTIVES ASSOCIATION

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July 16, 1996

The Honorable John L. Mica
Chairman
Civil Service Subcommittee
Committee on Government Reform & Oversight
U.S House of Representatives
Rm B-371C Rayburn House Office Bldg
Washington, D.C. 20515

In re: SEA's Comments on Proposed Omnibus Civil Service Reform Bill of 1996

Dear Mr Chairman:

We are pleased to submit our comments on the proposed Omnibus bill. Our comments are offered in the order in which the provisions of the bill were presented in the July 12, 1996, briefing paper given out at the meeting held by your staff for association and agency representatives.

I. DEMONSTRATION PROJECTS.

While we believe that demonstration projects serve a valuable purpose, we object to the Administration's unlimited ability to eliminate the demonstration project from all (or most provisions) of Title 5, and we likewise object to the proposed bill's provision which would allow five demonstration projects that can be of any size. Upon questioning, it was determined that the definition of "agency" in the bill would allow an entire department to establish a demonstration project free of nearly any of the provisions of Title 5. This could result in well over 50% of all federal employees being covered by "demonstration projects." We recommend that the total number of federal employees that can be covered in a demonstration project at any point in time be 10%. Although we believe even that number is too high.

As far as waivers of many of the Title 5 procedures, we strongly believe that an appeal right to the Merit Systems Protection Board must be maintained in order to prevent a proliferation of appeal systems by agencies with demonstration projects.

In cases involving an employee's property rights in pay or position in the federal government, and the liberty interest employees have in their name and reputation in conduct cases, we believe individual federal district courts would begin to accept federal employee appeals from agencies in demonstration projects, since there might be no coherent system in place to guarantee the employee's constitutional rights. Such a result could totally destroy the federal employees' appeal system. Further, since the Federal Circuit Court of Appeals could no longer ensure a uniform body of federal personnel law which would apply to federal employees, we would return to the days prior to the 1978 Civil Service Reform Act when appeals procedures were in chaos.

We have no objection to the requirement that ADR procedures be used prior to appeals being submitted to the Merit Systems Protection Board. Many agencies are already using such procedures effectively.

II. STREAMLINE APPEALS PROCESS.

We have no objection to elimination of the "mixed case procedures", since, in fact, the MSPB and EEOC have worked out a process which has eliminated the necessity for a "Special Panel".

We object strenuously to the employee being given the option to appeal adverse actions and other appealable actions to either the EEOC or the MSPB. We believe two results will occur First, employees will appeal all of their actions to the EEOC in the hopes of a more lenient forum. Second, since they will have raised a civil rights claim of one type or another, they will then proceed to the various Federal District Courts from the EEOC decision. Further appeals would be to the federal circuit court over the federal district court which had ruled on their case. This again will result in chaos. In addition, the EEOC has neither the organizational structure, the expertise, or the staffing to handle adverse action appeals.

Our recommendation is that all actions be appealed to the Merit Systems Protection Board, with the opportunity for the MSPB to seek the guidance of the EEOC as is now done. This will preserve the ability of the Federal Circuit Court of Appeals and of the two premier agencies (MSPB and EEOC) to develop a consistent body of law which applies to federal employees.

The legislative proposal is that Title 43 be amended to exclude the requirement that agencies provide performance improvement periods to employees in performance cases. We believe that that is a good proposal. However, we understand that others are considering recommending the consolidation of Chapters 43 and 75 into one procedure, and changing the standard of proof in performance cases from "substantial evidence" to "the preponderance of the

evidence " We object to the change in the standard of proof in performance cases Prior to the 1978 Civil Service Reform Act, the appeals system required proof by the agency of poor performance by preponderance of the evidence It was common for an employee to call as rebuttal witnesses (in order to defeat his/her supervisor's testimony) a number of "experts" who said that the employee's work was outstanding and that it was the supervisor who was unsatisfactory In addition, if previous supervisors had given the employee high ratings and a new supervisor currently evaluated the employee as unsatisfactory, the Board was forced to decide against the agency because of the previous highly satisfactory or outstanding performance appraisals. This created tremendous turmoil, since a substantial number of employees performing at the unsatisfactory level had their cases reversed and were then placed back into their agencies where they continued to perform in an unsatisfactory manner. Frankly, much of the reluctance of federal managers to bring adverse actions against unsatisfactory performance is because of the belief that the documentation requirements are still the same as those which existed prior to 1978. This proves two things: (1) It is very difficult to change the beliefs and culture of an agency unless substantial training efforts are made when laws are changed; and (2) agencies have a tremendously long memory for decisions adverse to them.

Therefore, we strongly recommend therefore that, under whatever system is established, the standard of proof necessary in performance cases remain "substantial evidence."

III PROCESSING FEDERAL SECTOR DISCRIMINATION CLAIMS LIKE PRIVATE SECTOR CLAIMS.

We are unsure of the intent of this proposal. If it means that federal employees would go to EEOC offices around the country, as private citizens do now, we wonder how those offices could handle the volume of complaints Currently, the agencies do most of the work in EEO complaints and provide the investigations and adjudications. It would require substantial realignment of resources from federal agencies to EEOC in order to allow this process to work. The processing of private sector complaints is currently very slow, and the inclusion of federal employee complaints would necessarily additionally slow down the process until a necessary realignment occurred. We believe this proposal needs expanded study prior to its adoption.

IV. REFORMING INTERNAL AGENCY PROCESSES FOR RESOLVING DISCRIMINATION COMPLAINTS IN USING ADR TECHNIQUES.

We agree that agencies should be required to use ADR techniques in attempting to resolve discrimination complaints. We think the proposal for 90-day mediation/conciliation or other ADR processes is appropriate.

V. ENHANCED PERFORMANCE MANAGEMENT.

We have no comment on the proposal to increase the weight given performance during RIFs. We do, however, believe that the consideration of three performance years in determining RIF standing is appropriate.

We are in support of the Administration's proposal to repeal appeal rights on denial of within grade increases. We are also in agreement with the remainder of the proposals under the performance management heading. We strongly support the additional collection of training information by OPM and its dissemination to Congress, the agencies, and professional associations.

VI. DUE PROCESS FOR MANAGERS

We especially are supportive of Section 305 concerning the due process rights of managers under agency arbitration procedures.

This proposal would amend 5 U.S.C. Section 7121(b) and eliminate the authority for an arbitrator to order the discipline of a manager in an arbitration procedure. Given the President's statement (when he signed the OSC legislation containing this provision 2 years ago) that even the Administration had grave doubts as to its constitutionality, we believe that its elimination is appropriate.

Some have proposed that the word "ordered" be amended to "recommend" in the current statute so that arbitrators can continue to recommend discipline of managers. We object.

In many, if not most, instances, the manager who the employee or the union may be seeking sanctions against is not even a part of the arbitration process. Not only is that individual not a party, he or she may not even know that the arbitration is taking place. Even if this individual were a witness, there is no opportunity for the manager to present his/her side of the case to the arbitrator prior to the arbitrator making a decision to "recommend" (or currently "order") discipline against the manager.

In earlier periods of history (e.g , during the Inquisition in Spain), it was not uncommon for tribunals to hold "trials" wherein the accused was not allowed to be present to defend him/her self, or to present evidence. The person's only right was to be brought before the tribunal at the end and told their sentence. From these and similar proceedings was coined the term "kangaroo court." For a law to sanction a proceeding where an individual can be libeled and slandered without being present and be "ordered" or "recommended" for some type of penalty, up to and including loss of their federal position, rises at least to the level of a "kangaroo court." The documenting of such "recommendation" by an arbitrator, making a finding and communicating

such finding to the head of an agency, could rise to the level of libel and slander. To the extent that such a recommendation has an impact on a federal employee's livelihood, it certainly could result in substantial damages to the employee. All this could occur without the employee knowing about the action, or, if they do know, being unable to participate and defend themselves. This kind of a proceeding should not be sanctioned by law and should never be included in a statute which defines the authority of arbitrators in the federal sector.

VII. ENHANCED THRIFT SAVINGS PLAN BENEFITS AND OPTIONS.

We are in complete support of all the proposed enhancements of the Thrift Savings Plan. We commend the Committee on seeking to allow employees the freedom to enhance their own retirement benefits.

We also support the provisions contained under the heading, "Reorganization Flexibility" and "Soft Landings." We do recommend that the non-reimbursable detail require the approval by both the agency and the employee.

We also support the provision authorizing agencies to reimburse up to one-half the cost of liability insurance for law enforcement employees, managers and executives. We support giving OPM the authority to disbar federal health care providers found to have engaged in fraudulent practices.

We are unable to comment on the separate legislation provisions included in the outline, since we are not familiar with the language that would be used to make the changes to HR 103.

Thank you, Mr. Chairman, for your hard work in developing and proposing this Omnibus legislation. We recognize that it took a substantial amount of effort on the part of the staff of the Subcommittee. We commend you and Ranking Minority Member Congressman Jim Moran and your staffs.

Sincerely,

Carol A. Bonosaro
President

G. Jerry Shaw
General Counsel

GJS:shm

ISBN 0-16-055848-4